TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1923

No. [redacted]201

SOUTHEASTERN EXPRESS COMPANY, PLAINTIFF IN ERROR,

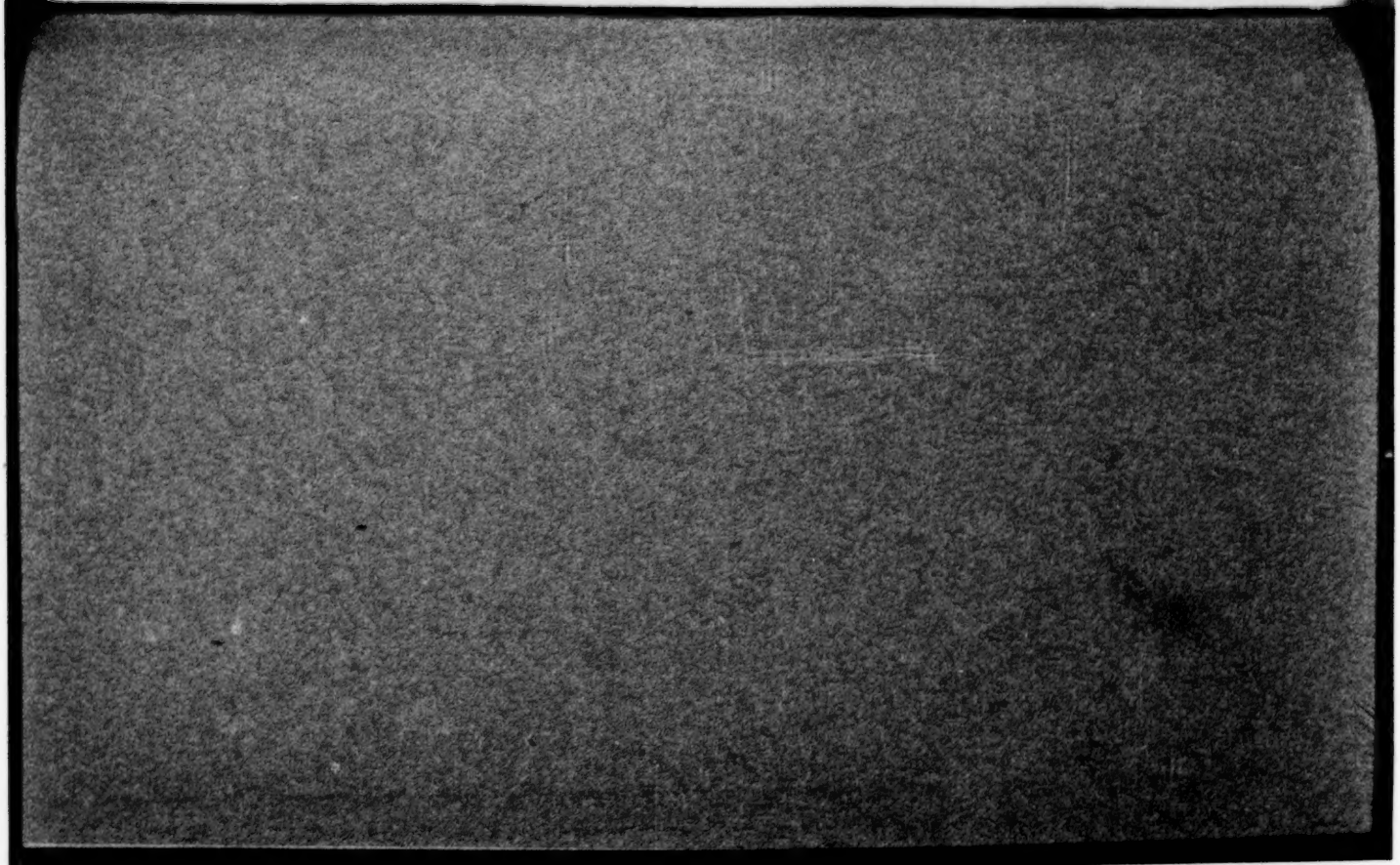
vs.

STOKES V. ROBERTSON, STATE REVENUE AGENT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

FILED JANUARY 31, 1924.

(29,252)



(29,352)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 802.

SOUTHEASTERN EXPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

STOKES V. ROBERTSON, STATE REVENUE AGENT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 23, 1923.

1 **Caption in Supreme Court of Mississippi.**

Pleas and proceedings had and done at a regular term of the Supreme Court of the State of Mississippi begun and held at the court-room, in the Capitol, in the City of Jackson, Mississippi, on the second Monday, being the 11th day of September, 1922, Division "A" sitting.

Present: The Honorable Sydney Smith, Chief Justice, the Honorable H. J. Holden and the Honorable W. D. Anderson, Associate Justices, W. J. Buck, clerk, in person and by W. J. Brown, D. C. and C. L. Johnson, Marshal.

Be it remembered that heretofore, to-wit, on May 17th, 1922, there was filed in the office of the Clerk of the Supreme Court of the State of Mississippi, a certain record, which with the endorsements thereon is in the words and figures following to-wit:

2 STATE OF MISSISSIPPI,
County of Lauderdale:

Circuit Court, March Term, 1921.

No. 406.

STOKES V. ROBERTSON, State Revenue Agent, Plaintiff,

versus

SOUTHEASTERN EXPRESS COMPANY, Defendant.

Hon. J. D. Fatherree, sole presiding.
Jury and verdict for the plaintiff for the sum of $4,383.50.
Plaintiff appeals.

Appearances: For the Plaintiff: Amis & Dunn; for the Defendant: Bozeman & Cameron.

3 **Index.**

Lauderdale County, Mississippi, Monday March 27, 1922, March Term, 1922, First Day of this Term of Court.

STATE OF MISSISSIPPI,
County of Lauderdale:

Be it remembered:

That a regular term of the Circuit Court of said County and State was begun and held this day, it being the Fourth Monday in March, 1922, and the 27th day thereof.

The said court being held in the Court House of said county and State and in the City of Meridian, Mississippi, it being the time and place designated by law for the holding of said court.

This term of court being held for the trial of Civil Matters only, as provided by law.

Present and in attendance upon said court, the following, to-wit:

Hon. J. D. Fatherree, Judge of the 10th Judicial Circuit Court District of the State of Mississippi;

John L. Barton, Official Court Stenographer for said District;

M. L. Rush, Clerk of Circuit Court of Lauderdale County, Mississippi;

Jno. M. Martin, Sheriff of Lauderdale County, Mississippi.

Among the causes coming on for hearing at this term of court was the cause styled:

STOKES V. ROBERTSON, State Revenue Agent,

vs.

SOUTH EASTERN EXPRESS COMPANY,

and is in the following words and figures to-wit:

5 STATE OF MISSISSIPPI,
Lauderdale County:

Circuit Court, September Term, 1921.

[Title omitted.]

Declaration.

[Filed July 29, 1921.]

Plaintiff Stokes V. Robertson, State Revenue Agent, brings this action for the use of the State of Mississippi, against the defendant, the Southeastern Express Company, a corporation, organized and existing under the laws of a foreign State, but having a principal office in charge of its certain Agent and Employees in the City of Meridian, County of Lauderdale, State of Mississippi; and for cause of action shows the following facts:

That the defendant, the Southeastern Express Company is engaged in the business of a common carrier in transporting freight, consisting of goods, wares, merchandise, and other articles for the public for hire, from one point to another in the State over and along certain lines of railways operating within the State of Mississippi. The business of said defendant being commonly known as that of an express company.

The said defendant, the Southeastern Express Company entered the State of Mississippi, and first begun to do business therein as an Express Company on the 1st day of May, 1921, and is now engaged in the conduct of such business within the State of Mississippi.

That by virtue of the provisions of Section 21, Chapter 1044 of the acts of the legislature of the State of Mississippi for the year 1921, the said defendant became and was bound to pay to
6 the State of Mississippi the sum of $500.00 as a privilege tax before beginning its said business; and also a further privilege tax amounting to $6.00 per mile on all first class railroad tracks in this state over which its said business was to be operated; and $3.00 per mile on all second or third class railroad tracks in this State over which its said business was to be operated.

That the said defendant did on the 1st day of May, 1921, and has since said date operated its business over and along 272.29 miles of first class railroad track owned by the Mobile & Ohio Railroad Company; and 42 and 80/100 miles of second class railroad tracks

owned by the Mobile & Ohio Railroad Company; and 153 and 75/100 miles of first class railroad tracks owned by the New Orleans & Northeastern Railroad Company; and 274 and 31/100 miles of second class railroad tracks owned by the Columbus & Greenville Railroad Company; and 34 and 1/100 miles of first class railroad tracks owned by the Memphis & Charleston Railroad Company; and 37 and 90/100 miles of second class railroad tracks owned by the Mobile & Ohio Railroad Company known as the Southern-Okolona Branch; all within the State of Mississippi; that is to say a total of 471 and 14/100 miles of first class railroad tracks, and 65 and 22/100 miles of second, third class railroad tracks on which by virtue of said section 21 of the Acts of 1920 the said defendant became bound to pay the sum of $2,787.84 as a privilege tax for operating its business over said 471 and 14/100 miles of first class railroad tracks, and the further sum of $1,095.65 for operating its said business over 365 and 22/100 miles of second, third class railroad tracks within the State of Mississippi, making a total privilege tax required to be paid by the said defendant before beginning its said business in the State of Mississippi, of $4,383.50.

7 That the said defendant failed to pay to the State of Mississippi, the said sum of $4,383.50, as a privilege tax upon its said business as it was bound and required to do under the law before the beginning the said business within the State of Mississippi, but failed and refused so to do; and from said 1st day of May, 1921, to this date said defendant has continuously conducted and operated its said business without having paid said privilege taxes, or any part thereof, and on account of its failure to pay the said taxes the said defendant has become and is liable and bound to pay the State of Mississippi double the amount of the said privilege taxes as required by Section 73 of Chapter 104 of the Acts of the Legislature of 1920, wherefore the plaintiff sues and demands judgment against the said defendant, the Southeastern Express Company in the sum and amount of $8,767.00 together with legal interest thereon from the 1st day of May, 1921, and all costs of suit. Stokes V. Robertson, State Revenue Agent, by Amis & Dunn, Attorneys for Plaintiff.

[File endorsement omitted.]

8 STATE OF MISSISSIPPI,
Lauderdale County:

In the Circuit Court, September Term, 1921.

[Title omitted.]

Interrogatories.

[Filed Aug. 10, 1921.]

Interrogatories to the Southeastern Express Company, a foreign corporation, the defendant, propounded under and pursuant to the provisions of Section 1938 of the Code of 1906 of Mississippi.

Int. 1. State the nature or character of business in which you are engaged.

Int. 2. State the day, month, and year when you first entered and begun to do business in the State of Mississippi.

Int. 3. State the number of miles of which is known and designated as first Class railroad track over which your business is operated within the State of Mississippi?

Int. 4. State the number of miles of which is designated or known as second or third class railroad track over which you operate your business within the State of Mississippi?

Int. 5. State the amount of privilege taxes, if any, paid by you and when and to whom the payment was made as imposed by the Laws of the State of Mississippi on the business of an Express Company?

Amis & Dunn, Attorneys of Record for Plaintiff.

9 The Sheriff of Lauderdale County, Mississippi, will deliver a true and correct copy of the foregoing interrogatories to the Southeastern Express Company and make due return hereon in the manner provided by law.

This the 10 day of August, 1921. M. L. Rush, Clerk. [Seal.]

I have this day executed the within writ personally, by delivering to J. H. Rice, Agent for the Southeastern Express Company at Meridian, Miss., a true copy of this writ.

This the 10 day of August, 1921. Jno. M. Martin, Sheriff, by Geo. W. Kynerd, Deputy Shff.

[File endorsement omitted.]

10 In the Circuit Court of Lauderdale County.

[Title omitted.]

Answers to Interrogatories Under Section 1938 Code.

[Filed Aug. 30, 1921.]

And the Southeastern Express Company, answering the interrogatories propounded to it by the Plaintiff under Section 1938 of the Mississippi Code of 1906, says:

Ans. to Int. 1. The nature and character of the business in which the defendant is engaged is that of an Express Company carrying express on railroad trains in both interstate and intrastate commerce.

Ans. to Int. 2. The defendant began business in the State of Mississippi on the 1st day of May, 1921.

Ans. to Int. 3 & 4. The defendant operates and carries express over tracks of the following railroads in the State of Mississippi:

Tracks of Alabama Great Southern Railroad.....	18.78 miles.
Tracks of New Orleans & North Eastern Railroad...	153.17 miles.
Tracks of Southern Railway, Okolona Branch.....	37.45 miles.
Tracks of Southern Railway, Memphis & Charleston.	34.20 miles.
Tracks of Mobile & Ohio Railroad.....	315.58 miles.
Tracks of Delta Southern.....	54.11 miles.
Tracks of Columbus & Greenville Railroad.....	236.57 miles.

No classification of said railroad tracks, or any part of them, into first class or second class or third class has ever been made with reference to the business or operation over them of this Defendant or any other Express Company; and therefore this Defendant says that no part of said tracks is known or designated as first class or second class or third class with reference to the operation of an Ex-
11 press Company over them.

Ans. to Int. 5. This defendant says that it has not paid any privilege taxes to any person under the laws of the State of Mississippi on the business of an Express Company.

Southeastern Express Company, by J. B. Hockaday, President & General Manager.

Sworn to and subscribed before me by said J. B. Hockaday of said Southeastern Express Company on this the 20th, day of August, 1921. Kendrick L. Scott, Notary Public. Notary Public, State of Georgia at Large. My commission expires August 24, 1924. (Seal.)

[File endorsement omitted.]

In Circuit Court of Lauderdale County.

[Title omitted.]

Demurrer to Declaration.

[Filed Sept. 26, 1921.]

The said Defendant demurs to the Declaration, and prays the judgment of the court if it shall make any further answer thereto: and it shows the following causes of demurrer, to-wit:

(1) The Declaration fails to state a cause of action against the Defendant.

(2) The facts stated in the declaration are insufficient in law to constitute a cause of action against the defendant.

12 (3) The Statutes set out in the declaration as the basis of this suit, being Section 21 of Chapter 104 of the Laws of Mississippi of 1920, is vague and indefinite and is void for uncertainty, and not susceptible of being enforced, in that it fails to designate or define what are first class railroad tracks or second class railroad tracks, and in that it fails to provide any method or tribunal or procedure, by which it may be ascertained and determined in due course what railroad tracks are first class or second class or

third class, with reference to the operation of the business of an express company over such tracks or as a basis for imposing a privilege tax upon express companies and the enforcement would amount to the taking of defendant's property without due process of law in violation of the 14th Amendment to the Constitution of the United States, which amongst other limitations upon the powers of the several states, contains the following provisions:

"Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

The protection of which constitutional provision Southeastern Express Company expressly claims, sets up and invokes.

(4) The said Statute (Section 21 of Chapter 104 of Laws, 1920) in that it seeks to exact a tax without making adequate and proper provision for the fair and correct ascertainment of such tax, is unconstitutional in that it permits the taking of property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, which amongst other limitations upon the powers of the several states, contains the following provision:

"Nor shall any state deprive any person of life, liberty
13 or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

The protection of which constitutional provision Southeastern Express Company expressly claims, sets up and invokes.

(5) The said statute otherwise deprives defendant of its property without due process of law and denies defendant the equal protection of the law and is in violation of the Fourteenth Amendment to the Constitution of the United States.

(6) Said Statute (Section 21) is a regulation of interstate commerce, and imposes a burden and tax upon the interstate business of the defendant and is in violation of Clause 3 of Section 8 of Article 1 of the Constitution of the United States, commonly known as the Commerce Clause, "Which amongst other powers conferred upon the Congress of the United States, invests it with the power to regulate commerce among the several states, the protection of which provision of the Constitution of the United States, Southeastern Express Company expressly sets up and invokes."

(7) The Statute set out in the declaration and relied upon by plaintiff as a basis for his right to recover of defendant double the amount of the alleged privilege tax, being Section 73 of said Chapter 104 of the Laws of Mississippi of 1920, when construed in connection with said Section 21 of said Act is also a regulation of interstate commerce, and imposes a burden and tax upon the interstate business of the defendant and is in violation of Clause 3 of Section 8 of Article 1 of the Constitution of the United States, commonly known as the Commerce Clause, "Which amongst other powers
14 conferred upon the Congress of the United States, invests it with the power to regulate commerce among the several states, the protection of which provision of the Constitution

of the United States, Southeastern Express Company expressly sets up and invokes.

(8) Said Statute (Section 73, Chapter 104, Laws 1920) also deprives defendant of its property without due process of law and denies defendant the equal protection of the law and is in violation of the Fourteenth Amendment to the Constitution of the United States.

(9) Said Statute (Section 73, Chapter 104, Laws 1920) imposes the severe penalty therein prescribed upon a person beginning a new business unless the privilege tax is paid and the license procured before beginning business, and provides, with reference to persons already in business, that such penalty shall not apply or be imposed unless and until such person shall fail to renew the privilege license during the month in which it falls due, and that said Section 73 unjustly discriminates against the Plaintiff and all persons beginning a new business, and is unconstitutional and void in that it denies to the Plaintiff equal protection of the laws, in violation of the Constitution of the United States, and particularly the Fourteenth Amendment thereof, hereinbefore quoted, the protection of which is claimed by this defendant.

(10) Said Statute (Section 73, Chapter 104, Laws 1920) imposes a penalty for non payment of privilege taxes which is harsh and excessive and unreasonable, and amounts to the taking of plaintiff's property without due process of the law, and to denying to the Plaintiff equal protection of the laws, in violation of the Constitution of the United States, and particularly the Fourteenth Amendment thereof, hereinbefore quoted. Bozeman & Cameron, Attorneys for Defendant.

[File endorsement omitted.]

15 In Circuit Court of Lauderdale County.

[Title omitted.]

Order Overruling Demurrer.

[Filed Oct. 24, 1921.]

This cause coming on for hearing on the demurrer of the defendant to the declaration, and the same having been duly considered, the court is of the opinion that the demurrer is not well taken and should be overruled.

It is therefore considered by the court that said demurrer be and the same is hereby overruled, and that defendant be permitted to plead further instanta.

[File endorsement omitted.]

In Circuit Court of Lauderdale County.

[Title omitted.]

Plea.

[Filed Oct. 28, 1921.]

And the defendant, by its Attorney, comes and defends the wrongs and injury, when, Etc., and says that it does not owe and is not indebted in the amount demanded or any part thereof in manner and form as the Plaintiff hath above complained against it, and of this it puts itself upon the country. A. S. Bozeman and Ben F. Cameron, Attorneys for Defendant.

[File endorsement omitted.]

16 In Circuit Court of Lauderdale County.

[Title omitted.]

Agreement.

[Filed Nov. 3, 1921.]

It is hereby agreed by and between Amis & Dunn, counsel of record for the plaintiff, and Bozeman & Cameron, Counsel of record for the defendant, that this cause may be tried by the presiding judge of the Circuit Court of Lauderdale County, Mississippi, in vacation, as provided and authorzed by Chapter 158 of the Acts of the Legislature of the State of Mississippi, of 1912. The cause shall be tried at such time and place as may be fixed by the said presiding judge, but it is the desire of all the parties hereto that the trial shall be had not later than thirty days from this date.

In testimony whereof witness our signatures this the 3rd day of November, 1921. Amis & Dunn, Attorneys of Record for Plaintiff. Bozeman & Cameron, Attorneys of Record for Defendant.

"Filed Nov. 3, 1921. M. L. Rush, Clerk."

17 [Title omitted.]

Order.

[Filed Nov. 3, 1921.]

This cause coming on this day for hearing, came the parties by their attorneys of record, and in open court agreed and consented that the cause shall be submitted for trial in vacation before the

presiding judge of the Circuit Court of Lauderdale County, Mississippi; and that a jury shall be waived, and the said judge shall try the cause without a jury, and shall determine the question of fact as well as of law, and render a final judgment in the premises pursuant to Chapter 158 of the Acts of the Legislature of the State of Mississippi, 1812.

"Filed Nov. 3, 1921. M. L. Rush, Clerk."

[File endorsement omitted.]

18 In Circuit Court of Lauderdale County.

[Title omitted.]

Notice under General Issue.

1. And the Plaintiff will take notice that the defendant will offer in evidence and prove under the general issue in bar of said action, that it carries express over all of the railroad tracks upon which it operates in the State of Mississippi in interstate commerce, carrying express over said railroad tracks from points without the State of Mississippi to points within the State of Mississippi, and from points within the State of Mississippi to points without the State of Mississippi, and from points without the State of Mississippi through the State of Mississippi to points without the State of Mississippi.

And the defendant insists and claims that the said Section 21 of Chapter 104 of the Laws of Mississippi of 1920 is a regulation of Interstate commerce, and imposes a burden and tax upon interstate business of the defendant, and is a violation of clause 3 of Section 8 of Aticle 1 of the constitution of the United States, which among other powers conferred on the Congress of the United States invests it with the power to regulate commerce among the several states; the protection of which provision of the Constitution of the United States, the Defendant expressly sets up and invokes. (Signed) Sanders McDaniel, Bozeman & Cameron, Attorneys for Defendant.

19 In Circuit Court of Lauderdale County.

[Title omitted.]

Replication to Defendant's Notice No. 1 under the General Issue.

1. Replying to said notice the plaintiff says, that while it is true, or may be true, that the defendant carries express over all of the railroad tracks upon which it operates in the State of Mississippi in interstate commerce as set out in said notice, nevertheless it is further true that the defendant also carries express over all of said railroad tracks, except as hereinafter stated in intra-state *state* busi-

ness or commerce. That is to say the defendant carries express over said railroad tracks located within this state from point to point, and station to station, located wholly within the state, and that the privilege taxes imposed by Section 21 of Chapter 104 of the Laws of Mississippi of 1920 is not imposed upon the defendant for carrying express in inter-state commerce, but that the said tax is imposed by said Act and the defendant is thereby required to pay the same for the privilege of conducting and doing its said intra-state business as an Express Company over railroad tracks from point to point and station to station wholly within the State of Mississippi; that the State of Mississippi, nor the plaintiff herein as an oflier thereof does not claim, and is not demanding of the defendant the payment of the privilege tax as imposed by Section 21, Chapter 104 of the laws of Mississippi of 1920 as and for the privilege of engaging in interstate business originating outside, terminating in, or passing through the State of Mississippi, but that the payment of said tax is claimed and demanded as required by said Act of the legislature, and as construed by the Supreme Court of Mississippi as a privilege for doing an intrastate business as an Express Company within the State of Mississippi; and defendant denies that said Section 21, Chapter 104 of the Laws of the State of Mississippi of 1920 as construed and applied by the Supreme Court of Mississippi, is in violation of interstate commerce and imposes a burden and tax upon the interstate business of the defendant; and denies that the same is a violation of Clause No. 3 of Section 8 of Article 1 of the Constitution of the United States.

The Plaintiff admits of the mileage of railroad tracks over which the defendant conducts its business in the State of Mississippi, that, that portion of the Alabama Great Southern Railroad from Kewanee station to the Alabama state line a distance of 1.98 miles; and that portion of the Columbus & Greenville Railroad from Steen Station to the Alabama state line; and that part of the Southern railroad from Iuka to Alabama State line, a distance of 6.5 miles; and that part of the Mobile & Ohio Railroad from Corinth to the Tennessee state line, a distance of 4.9 miles; and that part of the Mobile & Ohio Railroad from McCrary to the Alabama State line, a distance of .6 of a mile and that part of the New Orleans & Northeastern Railroad from Nicholson to the Louisiana State line, a distance of .27 of a mile is all devoted to the carrying of interstate commerce, and as to such mileage of said railroads the plaintiff does dot demand the payment of any privilege taxes, or penalties whatsoever, but only demands the payment of the privilege tax per mile upon that portion of the railroad tracks as are located wholly within this state, and lying between points or stations within this state over which the defendant is carrying interstate commerce. Stokes V. Robertson, State Rev. Agent, by Amis & Dunn, Attorneys.

21 In Circuit Court of Louderdale County.

[Title omitted.]

Notice under General Issue.

2. And the Plaintiff will take notice that the Defendant will further insist with regard to the penalty sued for in said declaration, that said Section 73 of Chapter 104 of the Acts of the Legislature of Mississippi of 1920, set up and relied upon by the Plaintiff as imposing said penalty upon the defendant (and as creating liability on the part of the defendant to pay the State of Mississippi double the amount of the alleged privilege tax, by reason of the failure of the defendant to pay the said privilege tax before it began business in the State of Mississippi) is in violation of the Constitution of the United States in the following particulars:

A. The said Section 73 when construed in connection with the said Section 21 of said Act is also a regulation of Interstate commerce, and imposes a burden and tax upon the interstate business of the defendant and is in violation of Clause 3 of Section 8 of Article 1 of the Constitution of the United States, commonly known as the Commerce Clause, "which amongst other powers conferred upon the Congress of the United States, invests it — the power to regulate commerce among the several states; the protection of which provision of the Constitution of the United States, Southeastern Express Company expressly sets up and invokes.

B. Said statute (Section 73 Chapter 104, Laws, 1920) also deprives defendant of its property without due process of law and denies defendant the equal protection of the laws and is in violation of the Fourteenth Amendment to the Constitution of the United States.

22 C. Said Statute (Section 73, Chapter 104, Laws 1920) imposes the severe penalty therein prescribed upon a person beginning a new business unless the privilege tax is paid and the license procured before beginning such business, and provides, with reference to persons already in business, that such penalty shall not apply or be imposed unless and until such person shall fail to renew the privilege license, during the month in which it falls due; and thereby said Statute unjustly discriminates against the Plaintiff and all persons beginning a new business, and is unconstitutional and void in that it denies to the Plaintiff equal protection of the laws in violation of the Constitution of the United States, and particularly the Fourteenth Amendment thereof, herein before quoted, the protection of which is claimed by this Defendant.

D. Said Statute (Section 73, Chapter 104, Laws 1920) imposes a penalty for non payment of privilege taxes which is harsh and excessive and unreasonable, and amounts to the taking of Plaintiff's property without due process of law, and to denying to the Plaintiff equal protection of the laws, in violation of the Constitution of the United States, and particularly the Fourteenth Amendment thereof,

hereinbefore quoted. (Signed) Sanders McDaniel, Bozeman & Cameron, Attorneys for Defendant.

23 In Circuit Court of Lauderdale County.

[Title omitted.]

Replication to Defendant's Notice No. 2 under the General Issue.

2. Replying to said notice the plaintiff denies that the payment of the penalty demanded by the plaintiff from the defendant as provided by Section 73 of Chapter 104 of the Acts of the Legislature of Mississippi, of 1920 by reason of the failure of the defendant to pay the privilege tax as imposed by Section 21 of Chapter 104 of the Acts of the Legislature of Mississippi of 1920, before it began business in the State of Mississippi, on the first day of May, 1921, is in violation of the Constitution of the United States in the particulars as set out in said notice or otherwise.

The plaintiff denies that said Section 73 when construed in connection with the said Section 21 of said Act, is a violation of interstate commerce and imposes a burden and tax upon the interstate business of the defendant and that the same is in violation of the clause 3 of Section 8 of Article 1 of the Constitution of the United States, commonly known as the commerce clause.

The plaintiff denies that said Statute, Section 73, Chapter 104, Laws of 1920 deprives defendant of its property without due process of law, and denies to the defendant the equal protection of the laws; and denies that the same is in violation of the Fourteenth Amendment to the Constitution of the United States.

The Plaintiff denies that said Section 73 Chapter 104 of the Acts of the Legislature of Mississippi of 1920, is unconstitutional in that it imposes a penalty therein prescribed upon a person beginning a business, unless the privilege tax is paid and the license pro-
24 cured before beginning such business, and provides, with reference to persons already in business, that such penalty shall not apply or be imposed, unless and until such persons shall fail to renew the privilege license, during the month in which it falls due, thereby unjustly discriminates against the plaintiff and all persons beginning a new business, and is unconstitutional and void in that it denies to the plaintiff equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

The Plaintiff denies that said State imposes a penalty for non payment of privilege taxes which is harsh and excessive and unreasonable, and amounts to the taking of plaintiff's property without due process of law, or denies to the Plaintiff the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States. Stokes V. Robertson, State Revenue Agent, by —— ——, Attorneys for Plaintiff.

In Circuit Court of Lauderdale County.

[Title omitted.]

Notice under General Issue.

[Filed Apr. 21, 1922.]

3. And the Plaintiff will further take notice that the defendant insists and claims, under and in support of its plea of the General Issue, that Section 21 of Chapter 104 of the Acts of the Legislature of the State of Mississippi for the year 1920, alleged and set up in the declaration as fixing the Defendant's liability for the Privilege Tax and Penalty in question, is vague, indefinite and void for uncertainty, and not susceptible of being enforced, in that it fails to designate or define what are first class railroad tracks or secondclass railroad tracks, and in that it fails to provide any method or tribunal or procedure, by which it may be ascertained and determined in due course what railroad tracks are first or second class or third class, with reference to the operation of the business of an express company over such tracks, or as a basis for imposing a privilege tax upon express companies, and the enforcement thereof would amount to the taking of Defendant's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, which amongst other limitations upon the powers of the several states, contains the following provisions;

"Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law".

the protection of which constitutional provision, Southeastern Express Company expressly claims, sets up and invokes.

B. And the Defendant further insists and claims that the said Section 21 of Chapter 104 of the Laws of Mississippi of 1920, in that it seeks to exact a tax, without making adequate provision for the fair and correct ascertainment of such tax, is unconstitutional in that it permits the taking of property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, which amongst other limitations upon the powers of the several states contains the following provision

"Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law".

the protection of which constitution provision, Southeastern Express Company expressly claims, sets up and invokes. (Signed) Sanders McDaniel, Bozeman & Cameron, Attorneys for Defendant.

[File endorsement omitted.]

In Circuit Court of Lauderdale County.

[Title omitted.]

Reply to the Defendant's Notice Number 3 under the General Issue.

[Filed May 2, 1922.]

3. The Plaintiff denies that Section 21 of Chapter 104 of the Acts of the Legislature of the State of Mississippi for the year 1920 imposing the privilege tax therein provided for and the penalty for failure to pay the same, is vague, indefinite and void for uncertainty and not susceptible of being enforced in that it fails to designate or define what are first class railroad tracks, or second class railroad tracks. Plaintiff says, that the state of Mississippi had heretofore by law provided a means and method for the classification of railroad tracks in the State of Mississippi and that the ascertainment of what class a railroad track within the State of Mississippi had been assigned to was easy of ascertainment with certainty and definiteness and the plaintiff therefore denies that the laws of Mississippi do not afford a certain and definite basis for imposing a privilege
27 tax upon Express Companies and denies that the enforcement of the said Act of the Legislature of the State amounts to the taking of the defendant's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Plaintiff further says, that by Chapter 102 of the Laws of Mississippi of 1912, it is made the duty of the Railroads of the State of Mississippi to annually on or before the first Monday in August of each year to classify the several railroads within the State of Mississippi according to their charter and the gross earnings of each and that the classification so made by the State Railroad Commission shall be certified to the Auditor of Public Accounts and to the Chancery Clerk of the County through which each road or roads run; that by the provision of said Chapter 102 of the laws of 1912, the said Railroad Commission of the State of Mississippi is required to classify such railroads and that in performance of said duty the said State Railroad Commission did on or before the first Monday in August, 1920 make the classification of railroads within the State of Mississippi as required by said act, and that the act of the said Railroad Commission in making such classification became and was a public record in the office of the State Auditor of Public Accounts on and before the first day of May, 1921, and that the defendant could have ascertained the true and exact amount of privilege taxes it should pay on its intrastate business as an Express Company within the State of Mississippi with ease and convenience had it chose to so have done. That the Supreme Court of the State of Mississippi had prior to the first day of May 1921 construed said Chapter 102, Laws of 1912, in the case of the New Orleans and North-

eastern Railroad Company versus the State, reported in 110
28 Miss. at page 290, as providing a lawful and constitutional method for the classification of railroad tracks within the State of Mississippi, and as being binding upon the State authorities, and all persons affected by the decision of the State Railroad Commission, and the Plaintiff therefore says that the classification of railroads as made by the State Railroad Commission on or before August 1, 1920, constituted a legal and valid classification of the railroad tracks within the State of Mississippi, and that such Act constituted a definite, certain and exact criterion when construed in connection with Section 21, Chapter 104 of the Acts of the Legislature of Mississippi of 1920 as to the amount of privilege taxes the defendant was required to pay before it began business in Mississippi on the 1st day of May, 1921; and the plaintiff therefore denies that said Section 21, Chapter 104 of the laws of Mississippi, 1920 is unconstitutional in that it permits the taking of property without the due process of law contrary to the Fourteenth Amendment to the Constitution of the United States. Stokes V. Robertson, State Revenue Agent, by —— ——, Attorneys for Plaintiff.

[File endorsement omitted.]

In Circuit Court of Lauderdale County.

[Title omitted.]

Agreed Statement of Facts.

[Filed May 2, 1922.]

For the purpose of the trial of this suit, it is agreed that the following facts exist:

29 (1) The defendant, Southeastern Express Company, began business on the first day of May, 1921.

(2) The nature and character of the business in which the said defendant is engaged is that of an express Company carrying express on railroad trains in both inter-state and intra-state commerce; that is to say, in carrying express from points outside the State of Mississippi to points within the State of Mississippi, and from points within the State of Mississippi to points without the State of Mississippi, and from points without the State of Mississippi through the State of Mississippi to points without the State of Mississippi and from points within the State of Mississippi to points within the State of Mississippi.

(3) The said defendant operates and carries express over the tracks of the following railroads in the State of Mississippi:

Tracks of Alabama Great Southern Railroad.....	18.78 miles.
Tracks of New Orleans & Northeastern Railroad....	153.17 miles.
Tracks of Southern Railway, Okolona Branch.....	37.45 miles.
Tracks of Memphis & Charleston (Southern Railway)	34.20 miles.
Tracks of Mobile & Ohio Railroad.....	315.58 miles.
Tracks of Columbus & Greenville Railroad.....	212.60 miles.

(4) It is agreed that the said defendant carries interstate express over all of the said railroad tracks but that it carries intra-state express only from station to station in the State of Mississippi and that it carries interstate express but no intra-state express over the following of the said railroad tracks:

Alabama Great Southern Railroad from Alabama State Line to Kewanee Station	1.98 miles.
Columbus & Greenville Railroad from Alabama State Line to Steen Station	2.59 miles.
Southern Railway (Memphis & Charleston) from Alabama State Line to Iuka	6.5 miles.
30 Mobile & Ohio Railroad from Tennessee State Line to Corinth	.....
From Alabama State line to McCrary	.06 miles.
New Orleans & North Eastern Railroad from Louisiana State line to Nicholson	.27 miles.

(5) The defendant Express Company also operated and carried express over the railroad tracks of the State of Mississippi from May 1st, 1921 to June 12th, 1921 of the Delta Southern, 52.11 Miles, but has carried no express over such tracks since June 12, 1921, said Delta Southern Railroad having then ceased operation of trains.

(6) In pursuance of Section 45 of Chapter 104 of Laws of Mississippi of 1920, the Mississippi Railroad Commission did on the first Monday of August, 1920, classify the several railroads in the State of Mississippi according to their charter and gross earnings of each for the purpose of levying privilege taxes on the said railroads and did for that purpose classify the tracks of the said railroads for the year beginning first Monday of August, 1920, as follows:

Alabama Great Southern Railroad	18.78 Miles first class.
New Orleans & North Eastern Railroad	153.17 Miles first class.
Memphis & Charleston Railroad	34.10 Miles first class.
Mobile & Ohio Railroad, Main Line	272.30 Miles first class.
Aberdeen Branch	9 Miles third class.
Columbus Branch	14.40 Miles third class.
Starkville Branch	11 Miles third class.
Montgomery Extension	8.41 Miles third class.
Okolona Branch	37.9 Miles third class.
31 Columbus & Greenville Main line	177.93 Miles second class.
Deer Creek (Percy) Branch	23.19 Miles third class.
Leland Spur-DC Branch	1.17 Miles third class.
Tallahatchie (Webb) Branch	34.56 Miles third class.
Delta Southern Railway	27.9 Miles third class.
Belzoni Branch	12.60 Miles third class.
Napanese Branch	10.56 Miles third class.

(6) It is further agreed that no further classification of said railroad tracks was made by said Mississippi Railroad Commission until August 1st, 1921, when they were again classified by said commis-

sion under Sec. 45 of Chapter 104 of the Laws of Mississippi of 1920 for the purposes therein recited.

(7) It is further agreed that no classification of said railroad tracks has ever been made by the Mississippi Railroad Commission under Section 21 of Chapter 104 of the Laws of Mississippi of 1920, nor otherwise with reference to the operation of the defendant Express Company or of any other express company over said tracks.

(8) It is further agreed that the assessment of $4,325.33 imposed for which this suit was brought, was made for the year beginning May 1, 1921 and ending May 1, 1922.

(9) It is further agreed that on the 17th day of May, 1921, the defendant, Southeastern Express Company tendered to Stokes V. Robertson, State Revenue Agent, the plaintiff, the said sum of $4,325.33 in payment of said assessment, but declined to pay and did not tender the amount of the penalty claimed by said State Revenue Agent, said penalty claimed being a like sum of $4,325.33.

(10) It is further agreed that intra-state business of the defendant Southeastern Express Company on the railroad tracks over which it did business in the State of Mississippi for the six (6)
32 months' period beginnng July 1, 1921 and ending December 1, 1921 was as follows:

Name of railway line.	Mileage.	Amount of intra-state business.	Business per mile.
Alabama Great Southern	18.78	$97.04	$5.16
Southern Railway.....	71.65	639.14	8.92
Columbus & Greenville ..	212.60	14,116.96	6.65
Mobile & Ohio	315.58	26,501.37	8 40
New Orleans and Northeastern	153.17	19,316.02	12.61

(11) It is further agreed that no part of the privilege tax in question has been yet paid. z

(12) It is further agreed that while all of the facts herein stated are true and correct but that either party may and does hereby reserve any and all objections and exceptions thereto for incompetency, immateriality or irrelevancy, for the purpose of establishing and proving any of the issues in this case.

Agreed to this the 26th day of April, 1922. Amis & Dunn, Attorneys for Plaintiff. Bozeman & Cameron, Attorneys for Defendant.

[File endorsement omitted.]

In Circuit Court for Lauderdale County.

[Title omitted.]

Instructions.

[Filed May 2, 1922.]

The court instructs the jury that under the facts admitted and agreed to in this case, the plaintiff is entitled to recover from the defendant the sum of Five Hundred Dollars and in addition thereto the further sum of $6.00 per mile on 464.64 miles of first class railroad tracks over which the defendant conducted an intra-
33 state business, as an express Company amounting in the aggregate to $2,787.84, and also the further sum of $3.00 per mile on 365.22 miles of second and third class railroad tracks over which the defendant conducted an intra state business as an Express Company amounting in the aggregate to $1,095.66, all as and for the privilege tax the defendant should have paid to the State of Mississippi for the year beginning May 1st, 1921 aggregating in all the sum of $4,383.50 and the jury will find for the plaintiff in said sum and amount.

"Given."

"Filed, 5-2-22. M. L. Rush, Clerk."

[Title omitted.]

The court instructs the jury that under the facts admitted and agreed to in this case, the plaintiff is entitled to recover from the defendant the sum of Five Hundred Dollars and in addition thereto the further sum of $6.00 per mile on 464.64 miles of first class railroad tracks over which the defendant conducted an intrastate business, as an express company, amounting in the aggregate to $2,787.84, and also the further sum of $3.00 per mile on 365.22 miles of second and third class railroad tracks over which the defendant conducted an intra-state business as an express company amounting in the aggregate to $1,095.66, all as and for the privilege tax the defendant should have paid to the State of Mississippi for the year beginning May 1st, 1921 aggregating in all the sum of $4,383.50, and that the plaintiff is also further entitled to recover from the defendant a penalty for failure to pay said
34 privilege tax before beginning business on March 1st, 1921, in the sum of $4,383.50, making a total of $8,767.00 and the jury will find for the plaintiff in said sum and amount.

"Refused."

"Filed, 5-2-22. M. L. Rush, Clerk."

[Title omitted.]

3. The Court instructs the jury for the defendant that the plaintiff is not entitled to recover of the defendant any penalty under Section 73 of Chapter 104 of the Laws of Mississippi of 1920, because of the failure of the defendant to pay its privilege tax before beginning business, and you should not return any verdict in this case against the defendant for the penalty sued for or any part thereof.

"Given."

"Filed, 5-2-22. M. L. Rush, Clerk."

Motion.

[Title omitted.]

Comes the defendant at the conclusion of the testimony in this case and moves the court to instruct the jury that the plaintiff is not entitled to recover of the defendant the privilege tax in question imposed by Section 21 of Chapter 104 of the Laws of Mississippi of 1920, because said Section 21 is void for uncertainty and is void and unenforcible, being in violation of Clause 3 of Section 8 of Article 1 of the Constitution of the United States; and being in violation of the Fourteenth Amendment to the Constitution of the United States, which provides, among other things, "Nor
35 shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," as more fully set up and relied upon in defendant's notices under the General Issue. Bozeman & Cameron, Attorneys for Defendant.

Instructions Requested.

1. The Court instructs the jury for the defendant that the plaintiff is not entitled to recover of defendant the privilege tax sued for under Section 21, Chapter 104 of the Laws of Mississippi of 1920, because the said statute is void for uncertainty and is in violation of the constitution of the United States, and particularly the Fourteenth Amendment thereof.

"Refused."

"Filed, 5-2-22. M. L. Rush, Clerk."

[Title omitted.]

2. The Court instructs the jury for the defendant that the plaintiff is not entitled to recover of defendant the privilege tax sued for under Section 21, Chapter 104 of the Laws of Mississippi of 1920,

because said statute is void, being in violation of Clause 3 of Section 8 of Article 1 of the Constitution of the United States.

"Refused."

"Filed, 5-2-22. M. L. Rush, Clerk."

36 In the Circuit Court of Lauderdale County.

[Title omitted.]

Judgment.

[Filed May 2, 1922.]

This cause coming on for trial, come the parties in person and by attorneys, and the issue being joined, a jury composed of W. R. Pistole and eleven others having qualified and being accepted, empaneled and sworn to try the issue, having heard the evidence and being instructed by the court, retired to consider their verdict, and presently returned into open court the following verdict:

"We the jury find for the plaintiff and assess damages in his favor in the sum of the $4,383.50."

It is therefore considered by the Court that Stokes V. Robertson, State Revenue Agent of the State of Mississippi, do have and recover, for the use of the State of Mississippi, from the defendant the Southeastern Express Company, a corporation the sum of $4,383.50 and all costs of suit for which let execution issue.

[File endorsement omitted.]

STATE OF MISSISSIPPI,
Lauderdale County:

In Circuit Court.

[Title omitted.]

Petition for Appeal.

[Filed May 5, 1922.]

To the Hon. M. L. Rush, Clerk of the Circuit Court of Lauderdale County, Mississippi:

A judgment having been rendered by the Circuit Court of Lauderdale County, Mississippi, at the March, 1922, term of said
37 court in favor of Stokes V. Robertson, State Revenue Agent plaintiff against the Southeastern Express Company, defendant, for the sum of $4,383.50 and costs. And the plaintiff feeling aggrieved at said judgment, hereby prays an appeal therefrom to the Supreme Court of Mississippi, as provided by law in such cases.

Stokes V. Robertson, State Revenue Agent, Plaintiff, by Amis & Dunn, Attorneys of Record.

[File endorsement omitted.]

Citation and Service.

The State of Mississippi to the Sheriff of Lauderdale County, Greeting:

Whereas, on the Second day of May, A. D., 1922, by judgment of our Circuit Court of Lauderdale County, in the aforesaid State Stokes V. Robertson, State Revenue Agent, plaintiff recovered judgment against Southeastern Express Company, Defendant for the sum of $4,383.50 besides the cost of suit; and the said Stokes V. Robertson having prayed and obtained an appeal returnable unto our Supreme Court at Jackson, on the first Monday of July, 1922, next, and having given bond for Supersedeas:

We command you to cite The Said Southeastern Express Company or Bozeman & Cameron Attorney- of Record, to appear then and there in and before said Supreme Court to defend the said appeal and have then and there this precept before our said Supreme Court.

Witness the Honorable Sydney Smith, Chief Justice of our Supreme Court the First Monday of July, A. D. 1922.

Witness, also M. L. Rush, Clerk of our said Circuit Court, and the seal of his Court affixed the 11th day of May, A. D., 1922. M. L. Rush, Clerk. McRae Mosby, D. C.

38 I have this day executed the within writ personally by delivering to the within named B. F. Cameron of the law firm of Bozeman & Cameron, attorneys of record for Southeastern Express Co. a true copy of this writ.

This the 11th day of May, 1922. Jno. M. Martin, Sheriff, by ——, Deputy Sheriff.

Fee Bill.

M. L. Rush, clerk:

Making transcript	$14.30
Issuing citation	.75
Entering return thereon	.25
Expressage	.50
Binding record	1.00
	$16.80

Jno. M. Martin, sheriff:

Serving citation	2.00
	$18.80

The above amount due and unpaid.

Clerk's Certificate.

STATE OF MISSISSIPPI,
County of Lauderdale:

I, M. L. Rush, Clerk of the Circuit Court in and for the above county and state hereby certify that the within and foregoing pages contain a true and correct copy of the record in the cause styled: Stokes V. Robertson, State Revenue Agent, vs. Southeastern Express Company, as the same is of record in this office.

Witness my signature and official seal, at Meridian, Mississippi, this the 11th day of May, A. D., 1922. M. L. Rush, Clerk.

39 [File endorsement omitted.]

40 **Assignment of Errors by Appellant.**

[Filed Sept. 15, 1922.]

In the Supreme Court of Mississippi.

No. 22858.

[Title omitted.]

Assignment of Errors.

And now comes the Appellant Stokes V. Robertson, State Revenue Agent, by his attorneys, and complaining of errors committed by the Court below, which errors were prejudicial to the rights of the Appellant, shows the following:

First. The court erred in refusing the instruction requested by the Appellant, in writing, as follows:

"The court instructs the jury that under the facts admitted and agreed to in this case, the plaintiff is entitled to recover from the defendant the sum of Five Hundred Dollars and in addition thereto the further sum of $6.00 per mile on 464.64 miles of first class railroad tracks over which the defendant conducted an intrastate business, as an express company amounting in the aggregate to $2,787.84, and also the further sum of $3.00 per mile on 365.22 miles of second and third class railroad tracks over which the defendant conducted an intrastate business as an express company amounting in the aggregate to $1,095.66 all and as for the privilege tax the defendant should have paid to the State of Mississippi for the year beginning May 1st, 1921, aggregating in all the sum of $4,383.50, and that the plaintiff is also further entitled to recover from the defendant a penalty for failure to pay said privilege tax before beginning business on May 1st, 1921, in the sum of $4,383.50 making a total
41 of $8,767.00 and the jury will find for the Plaintiff in said sum and amount."

Second. The court erred in granting the instruction requested by the Defendant, in writing, as follows:

"The Court instructs the jury for the defendant that the plaintiff is not entitled to recover of the defendant any penalty under Section 73 of Chapter 104 of the Laws of Mississippi of 1920, because of the failure of the defendant to pay its privilege tax before beginning business, and you should not return any verdict in this case against the defendant for the penalty sued for or any part thereof."

Third. The court erred in holding that the Appellant was not entitled to recover the penalty provided by Section 73, Chapter 104 Acts of the Legislature 1920, for the failure of the Appellee to pay the privilege tax required of it before beginning business on the first of May, 1921. Respectfully, —— ——, Counsel for Appellant.

Certificate.

We hereby certify that we have this day delivered to Messrs. Bozeman & Cameron, Counsel of record, for the appellee a true and correct copy of the assignment of errors. Witness our signature, this the 14th day of September, 1922. —— ——, Counsel for Appellant.

[File endorsement omitted.]

42 **Cross-appeal and Assignment of Errors.**

[Filed Sept. 25, 1922.]

In the Supreme Court of Mississippi.

No. 22858.

[Title omitted.]

Cross-Assignment of Errors.

This cause having been appealed to this court by Stokes V. Robertson, State Revenue Agent, appellant, comes the Southeastern Express Company, appellee, and feeling aggrieved at the final judgment rendered against it in this cause, prosecutes this its cross-appeal from said judgment, and assigns the following errors of the Court below, and submits that by reason of the errors hereinafter assigned the judgment of the Court below should be reversed and judgment should be entered here for cross-appellant.

1. The court below erred in over-ruling the demurrer of cross-appellant, being the defendant below, to the plaintiff's declaration.

2. The court below erred in holding and adjudging that the statute in question, being Section 21 of Chapter 104 of the Laws of Mississippi of 1920, is not vague and indefinite and is not void for uncertainty, in that it fails to designate or define what are first

class railroad tracks or second class railroad tracks, and in that it fails to provide any method or tribunal or procedure by which it may be ascertained and determined in due course what railroad tracks are first class or second class or third class with reference to the operation of the business of an express company over such tracks, or as a basis for imposing a privilege tax upon Express Companies.

43 3. And in holding that the enforcement of said statute against cross-appellant would not amount to the taking of defendant's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, the protection of which constitutional provision was expressly claimed, set up and invoked by cross-appellant.

4. The Court below erred in holding upon hearing said demurrer that the said statute (Section 21 of Chapter 104 of the Laws of 1920) did not seek to exact a tax without making adequate and proper provision for the fair and correct ascertainment of such tax, and that said statute was not unconstitutional and did not permit the taking of property without due process of law, contrary to the Fourteenth Amendment of the United States, the protection of which was expressly claimed, set up and invoked by cross-appellant.

5. The court below erred in holding and adjudging on the hearing of said demurrer that the said statute (Section 21 of Chapter 104 of the Laws of 1920) was not a regulation of interstate commerce and did not impose a burden and tax upon the interstate business of cross appellant and was not in violation of Clause 3 of Section 8 of Article 1 of the Constitution of the United States, which constitutional provision was expressly set up and invoked by cross appellant.

6. The Court below erred in holding and adjudging upon the hearing of said demurrer that Section 73 of said Chapter 104 of the Laws of Mississippi of 1920, when construed in connection with said Section 21 of said Act, is not a regulation of interstate commerce and did not impose a burden and tax upon the interstate business of cross appellant and is not in violation of said clause 3 of Section 8, Article 1 of the Constitution of the United States, which constitution provision was expressly set up and invoked by cross appellant.

44 7. The court below erred in holding and adjudging on the hearing of said demurrer that said Section 73 of Chapter 104 of the Laws of 1920 did not unjustly discriminate against the plaintiff and all persons beginning a new business, in favor of persons already in business, and was not unconstitutional and void, by reason thereof, and by reason of the fact that it denied to plaintiff the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States, the protection of which was expressly claimed and set up by the cross appellant.

8. The Court below erred in holding and adjudging on the hearing of said demurrer that said Section 73 of Chapter 104 of the Laws of 1920 did not impose a penalty for non-payment of privilege tax, which was harsh and excessive and unreasonable, and which amounts to taking the property of the cross appellant without due process of law and to denying to cross appellant the equal protection of the laws,

in violation of the Constitution of the United States and particularly the Fourteenth Amendment thereof, which was expressly set up and invoked by cross appellant.

9. The court erred in refusing to instruct the jury upon request of the cross appellant that plaintiff below was not entitled to recover of cross appellant the privilege tax sued for under Section 21 of Chapter 104 of the Laws of Miss. of 1920 because the said statute was void for uncertainty and in violation of the Constitution of the United States, and particularly the Fourteenth Amendment thereof.

10. The Court below erred in refusing to instruct the jury, at the request of cross-appellant, that the plaintiff was not entitled to recover of the cross appellant the privilege tax sued for under Section 21, Chapter 104 of the Laws of Mississippi of 1920, because
45 said statute was void, being in violation of Clause 3 of Section 8 of Article 1 of the Constitution of the United Sates.

11. The Court below erred in instructing the jury at the request of the plaintiff, that under the facts admitted and agreed to in this case, the plaintiff is entitled to recover from the defendant the sum of Five Hundred Dollars, and in addition thereto the further sum of $6.00 per mile on 464.64 miles of first class railroad tracks over which the defendant conducted an intrastate business, as an express company amounting in the aggregate to $2,787.84, and also the further sum of $3.00 per mile on 365.22 miles of second and third class railroad tracks over which the defendant conducted an intrastate business as an express company amounting in the aggregate to $1,095.66, all as and for the privilege tax the defendant should have paid to the State of Mississippi for the year beginning May 1st., 1921, aggregating in all the sum of $4,383.50, and the jury will find for the plaintiff in said sum and amount.

12. In giving said instruction, at the request of the plaintiff below, and in refusing to instruct the jury at the request of the cross-appellant, that plaintiff was not entitled to recover of cross-appellant the privilege tax sued for under Section 21 of Chapter 104 of the Laws of Mississippi of 1920, the court below,

(*a*) denied to cross-appellant rights claimed by it under the Constitution of the United States; and

(*b*) erred in holding that said Section 21 of Chapter 104 of the Laws of Mississippi of 1920, which prescribed the privilege tax covered by said instructions was a valid, enforcible statute and was not vague and indefinite and void for uncertainty, in that it failed to designate or define what are first class railroad tracks, or second class railroad tracks, and in that it failed to provide any method or
46 tribunal or procedure by which it may be ascertained and determined in due course what railroad tracks are first class, or second class, or third class, with reference to the operation of the business of an express company over such tracks, or as a basis for imposing a privilege tax upon express companies, and that the enforcement of said statute would not amount to the taking of defendant's property, without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States; and

(*c*) Erred in holding that said statute did not seek to exact a tax without making adequate and proper provision for the fair and correct ascertainment of such tax and was not unconstitutional for that reason, and was not contrary to the Fourteenth Amendment to the Constitution of the United States; and

(*d*) Erred in holding that said statute was not a regulation of interstate commerce, and did not impose a burden and tax upon the interstate business of the defendant, in violation of clause 3, Section 8 of Article 1 of the Constitution of the United States, all of which constitutional provisions were expressly set up and invoked by cross appellant.

13. The statute of the State of Mississippi, being Section 21 of Chapter 104 of the Laws of Mississippi of 1920, as administered and interpreted by the court below in the instruction given to the jury at the request of the plaintiff, and in refusing the instructions asked by the defendant below and refused by the court, and in the judgment rendered by the court below, contravenes the Fourteenth Amendment to the Constitution of the United States and deprives cross-appellant of its property without due process of law, and denies to it the equal protection of the law; and also contravenes Clause 3 of Section 8 of Article 1 of the Constitution of the United States.

47 14. If this court shall affirm the judgment of the court below, the said statute of the State of Mississippi, being section 21, Chapter 104 of the Laws of Mississippi of 1920, as administered and interpreted by this Honorable Court, will be in violation of the said Fourteenth Amendment to the Constitution of the United States and will deprive the cross-appellant of its property without due process of law and will deny to it equal protection of the law, and will also be in violation of Clause 3 of Section 8 of Article 1 of the Constitution of the United States, the protection of which constitutional provisions is expressly claimed, set up and invoked in this Honorable Court, by the cross-appellant. Sanders McDaniel, Bozeman & Cameron, Attorneys for Cross-Appellant.

We hereby certify that we have this day delivered a copy of the foregoing cross-appeal and assignment of errors to Amis & Dunn, attorneys for appellant.

This the 23rd day of September, 1922. Bozeman & Cameron, Attorneys for cross-appellant.

[File endorsement omitted.]

48 **Order of Submission.**

Minutes Supreme Court of Mississippi, September Term, 1922, *Tuesday, November 7th,* 1922.

[Title omitted.]

Submitted on briefs by Amis & Dunn for Appellant and Bozeman & Cameron for appellee.

Judgment.

Minutes Supreme Court of Mississippi, September Term, 1922, *Monday, December 4th,* 1922.

[Title omitted.]

This cause having been submitted on a former day of this term on the record herein from the Circuit Court of Lauderdale County and this court having sufficiently examined and considered the same and being of opinion that there is error therein, doth order and adjudge that the judgment of said Circuit Court rendered in this cause at the March Term, 1922, on the 2nd day of May, 1922, be and the same is hereby reversed and this court proceeding now here to enter such judgment as should have been entered in the court below, doth order and adjudge that appellant do have and recover of appellee the sum of $8,767.00 the amount sued for in the court below as well as interest on said sum from the first day of May, 1921, until paid at the rate of 6 per centum per annum and also the costs of this cause in this court and in the court below to be taxed, etc.

49 In the Supreme Court of Mississippi, Division A.

Smith, C. J.

No. 22858.

[Title omitted.]

Opinion, Smith, C. J.

[Filed Dec. 4, 1922.]

This is an action at law by the State Revenue Agent against the Southeastern Express Company to recover from the Company the privilege tax provided by Section 21, Chapter 104, Laws of 1920, Hemingway's Code Supplement 1921, Section 6512, and also damages provided by Secion 73, Chapter 104, Laws of 1920, Hemingway's Code Supplement 1921, Section 6630, for exercising a privilege without having first paid the tax required therefor.

The cause was tried upon an agreed statement of facts from which it appears as set forth in the brief of counsel for appellant:

"That the Southeastern Express Company began business on the 1st day of May, 1921; that it was engaged in carrying express on railroad trains, both interstate and intrastate; that it operated and carried such express in the State of Mississippi over the tracks of the several railroads set out in the statement; that it carried interstate express over all of said railroad tracks in the State of Mississippi, but that it carried intrastate express only from station to station in

the State of Mississippi, and that it carried interstate express only over that portion of said railroads lying between the last stations within the State of Mississippi and the State line, showing 11.4 miles of railroad track in the State of Mississippi over which the defendant carried interstate express only. That in pursuance of Section 45 of said Chapter 104 the Mississippi Railroad Commission
50 did on the 1st day of August, 1920, classify the several railroads in the State of Mississippi according to their charters and the gross earnings of each, for the purpose of levying privilege tax on said railroads, the classification being set out in the statement.

"That no further classification of said railroad tracks was made by the Mississippi Railroad Commission until August 1st, 1921, when they were again classified by said Commission under said Section 45 for the purposes therein cited.

"That no classification of said railroad tracks was ever made by the Mississippi Railroad Commission under Section 21 of said Chapter 104 of the Laws of Mississippi of 1920, or otherwise, with reference to the operation of the defendant Express Company or any other Express Company over said tracks.

"That the privilege tax sued for covers the year beginning May 1, 1921, and ending May 1, 1922.

"That on May 17, 1921, the defendant Express Company tendered to Stokes V. Robertson, State Revenue Agent, the amount of the privilege tax demanded by him, but declined to pay or tender the amount of the penalty demanded and claimed by him, but that no part of either the privilege tax or the penalty had been paid.

"That for the six months period beginning July 1, 1921 and ending December 1, 1921, the intrastate business of the defendant Express Company over the several railroad tracks per mile was as follows:

"Alabama Great Southern, First Class	5.16
Southern Railway, First Class	8.92
Columbus & Greenville, Second & Third Class	6.65
Mobile & Ohio, First Class	8.40
New Orleans & North Eastern First Class	12.61."

51 The jury in accordance with an instruction from the court so to do returned a verdict in favor of the plaintiff for the amount of the tax, but not for the penalty sued for, and from the judgment entered thereon there is a direct appeal by the Revenue Agent and a cross-appeal by the Express Company.

The contentions of counsel for the Express Company are: First, that—

"Section 21 of Chapter 104, of the Laws of 1920, is vague, indefinite and void for uncertainty, in that it fails to designate or define what are first class railroad tracks, and in that it fails to provide any method or tribunal or procedure by which it may be ascertained or determined in due course what railroad tracks are first class or second class or third class, with reference to the operation

of the business of an express company, or as a basis for imposing a privilege tax upon express companies."

Second, that—

"If Section 45 is to be ingrafted upon Section 21 for the purpose of supplying the deficiency in Section 21, the statute, so combined, is in violation of the 14th. amendment to the Constitution of the United States, in that it neither provided for nor requires notice to be given express companies and gives them no right or opportunity to be heard on the matter of classification of the railroad tracks over which they operate."

Third, that—

"Section 21 is violative of the Commerce Clause of the Constitution of the United States."

Fourth, that—

Section 73, Chapter 104, Laws of 1920, Hemingway's Supplement 1921, Section 6630, discriminates against persons beginning a new business, thereby denying them the equal protection of the laws in violation of the 14th. Amendment to the Federal Constitution.

52 The discrimination here complained of is that a person beginning a new business is liable for the damages provided by the statute unless he pays the privilege tax required therefor before beginning business but may renew the privilege tax on an old business at any time "during the month in which it is due" without being liable for the damages.

We are of the opinion that the first, second, and third class railroads referred to in Section 21, Chapter 104, Laws of 1920, Hemingway's Supplement 1921, Section 6512, are those required by Section 45, Chapter 104, Laws of 1920, Hemingway's Code Supplement 1921, Section 6573, to be so classified by the Railroad Commission: That the constitutional due process of law requirement is not violated by the classification of railroads without notice to express companies intending thereafter to transport or engage in transporting freight over them; that although the freight transported by the appellant is both in interstate and intrastate commerce subjecting it to the tax does not violate the Commerce Clause of the Federal Constitution, the tax being imposed on the intrastate commerce: N. O. M. & C. R. R. Co. v. State, 110 Miss. 290, 70 So. 355; and that the discrimination complained of between persons beginning a new and those conducting an old business is not unreasonable, and therefore does not violate the 14th. Amendment to the Federal Constitution.

From which it follows that the court below committed no error in instructing the jury to return a verdict for the amount of the tax

sued for but erred in instructing it not to return a verdict for the damages.

The judgment of the court below will be reversed and judgment will be rendered here in favor of the appellant for both the tax and the damages sued for.

Reversed and judgment here.

[File endorsement omitted.]

53 In the Supreme Court of Mississippi.

No. 22858.

[Title omitted.]

Petition for Writ of Error.

[Filed Dec. 18, 1922.]

Southeastern Express Company, appellee and cross appellant, respectfully shows that on the 4th day of December, in the year 1922, the Supreme Court of Mississippi, which is the highest Court in the State of Mississippi in which a decision in this case could be rendered, rendered a judgment against your petitioner in this action and cause, said Court having affirmed so much of the judgment of the lower Court, the Circuit Court of Lauderdale County, Mississippi, as was for the amount of the privilege tax sued for by said Stokes V. Robertson as State Revenue Agent of the State of Mississippi (from which portion of the judgment of the lower Court Southeastern Express Company appealed), and reversed so much of said judgment as was against said Stokes V. Robertson, Revenue Agent, on account of the damages or penalty sued for by said Robertson for the failure of Southeastern Express Company to pay said privilege tax, from which latter portion of the lower Court's judgment denying the right of said Robertson to recover said damages or penalty he appealed to the said Supreme Court of Mississippi.

In said action there was specially set up by said Southeastern Express Company and drawn in question the validity of certain statutes of the State of Mississippi and an authority exercised under said State on the ground of their being repugnant to the Constitution of the United States, and the decision of said Supreme Court of the State of Mississippi is in favor of their validity, all of which will more fully and in more detail appear from the assignment of errors filed herein and herewith.

54 Wherefore, and inasmuch as your petitioner feels aggrieved by the final decision of the Supreme Court of Mississippi in rendering judgment against it, it respectfully prays that a writ of error may issue from the Supreme Court of the United States to the Supreme Court of Mississippi for the correction of the errors complained of; that an order may be entered fixing the amount of

a supersedeas bond herein; and that a duly authenticated record of the transcript and proceedings herein in said Supreme Court of Mississippi may be sent to the Supreme Court of the United States, and that the decision and judgment of the said Supreme Court of Mississippi may be reversed and annulled.

This, 18th day of December, 1922. Sanders McDaniel, H. L. Greene, Bozeman & Cameron, Attorneys for Southeastern Express Company.

Order Allowing Writ and Fixing Bond.

[Filed Dec. 18, 1922.]

In the Supreme Court of Mississippi.

Let the writ of error above prayed for issue upon the execution of a bond by Southeastern Express Company, payable to Stokes V. Robertson, State Revenue Agent, his heirs, executors, administrators, assigns and successors in office, in the sum of Twelve Thousand Dollars; such bond, when approved, to act as a supersedeas.

This 18th day of December, 1922. Sydney Smith, Chief Justice Supreme Court of Mississippi.

[File endorsement omitted.]

55 In the Supreme Court of Mississippi.

[Title omitted.]

Writ of Error.

[Filed Dec. 18, 1922.]

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Mississippi, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in said Supreme Court of Mississippi before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between Stokes V. Robertson, State Revenue Agent, and Southeastern Express Company, wherein was set up and drawn in question the validity of statutes of and an authority exercised under said State of Mississippi, on the ground of their being repugnant to the Constitution of the United States, and the decision is in favor of their validity; a manifest error hath happened to the great damage of said Southeastern Express Company, as by its complaint appears. We being willing that error, if any hath been, should be duly cor-

rected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Wash-
56 ington within thirty (30) days from the date hereof, that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 18th day of December in the year of our Lord one thousand nine hundred and Twenty Two. Jaes. Thompson, Clerk United States District Court, Southern District of Mississippi. [Seal of the United States District Court, Southern District of Mississippi.]

Allowed, This December 18th, 1922. Sydney Smith, Chief Justice, Mississippi Supreme Court.

[File endorsement omitted.]

57 In the Supreme Court of Mississippi.

[Title omitted.]

Citation and Service.

[Filed Dec. 18, 1922.]

UNITED STATES OF AMERICA, *ss:*

To Stokes V. Robertson, State Revenue Agent, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of Mississippi, wherein the Southeastern Express Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Sydney Smith, Chief Justice of the Supreme Court of the State of Mississippi, this 18th day of Dec., in the year of Our Lord, one thousand nine hundred and twenty two. Sydney Smith, Chief Justice Supreme Court of Mississippi.

[File endorsement omitted.]

57½ Due and legal service of the within and foregoing citation acknowledged, and copy thereof received. All other and further service and notice waived.

Service is also acknowledged of petition for writ of error, assignment of errors, writ of error and all further proceedings connected therewith. All other and further service waived.

This 19th day of Dec., 192-. Amis & Dunn, Attorneys for Stokes V. Robertson, State Revenue Agent, Defendant in Error.

58 In the Supreme Court of Mississippi.

[Title omitted.]

Assignment of Errors for the Supreme Court of the United States.

[Filed Dec. 18, 1922.]

This was an action originally brought in the Circuit Court of Lauderdale County, Mississippi, by Stokes V. Robertson, as State Revenue Agent for the State of Mississippi, against Southeastern Express Company to recover a privilege tax, the right to impose which was claimed by said Robertson as State Revenue Agent under a certain statute of the State of Mississippi, the same being Section 21, Chapter 104, Laws of 1920 (Hemingway's Supplement, 1921, Section 6512); as well as for damages or penalty in amount equal to said tax, for the failure of said Southeastern Express Company to pay said privilege tax before it entered business in Mississippi, said damages or penalty being claimed by said State Revenue Agent to arise under a certain statute of said State of Mississippi, to-wit: Section 73, Chapter 104, Laws of 1920 (Hemingway's Supplement, 1921, Section 6630).

Judgment was rendered in the lower Court against said Southeastern Express Company for the amount of the privilege tax, and was rendered against said Stokes V. Robertson and in favor of Southeastern Express Company insofar as the suit for damages or penalty was concerned.

Stokes V. Robertson, as State Revenue Agent filed an appeal to the Supreme Court of Mississippi to reverse so much of the judgment as denied his right to recover the damages or penalty sued for; and Southeastern Express Company filed a cross appeal from so much of the judgment of the lower court as was against it.

59 The Supreme Court of Mississippi affirmed the judgment of the lower Court, which was appealed from by Southeastern Express Company, and reversed the judgment which was appealed from by said Robertson, as State Revenue Agent, and on the 4th day of December, 1922, entered judgment against Southeastern Express Company both for the amount of the privilege tax and the amount of the damages or penalty sued for.

Southeastern Express Company, having applied for a writ of error from the Supreme Court of the United States to the Supreme Court of Mississippi by reason of the fact that there was expressly set up by said Southeastern Express Company and drawn in question in the case the validity of certain statutes of the State of Mississippi and an authority exercised under said State upon the point of their

being repugnant to the Constitution of the United States, and the decision was in favor of their validity, said Southeastern Express Company, in connection with said petition for writ of error, respectfully assigns as errors in the record and the proceedings in this cause in the Supreme Court of Mississippi the following:

1.

The Supreme Court of Mississippi erred in holding that the privilege tax prescribed in Section 21, Chapter 104, Laws of 1920 (Hemingway's Supplement, 1921, Section 6512) to be paid by express companies could legally be collected; and in rendering judgment against said Southeastern Express Company for said privilege tax; and in not holding that said Statute was void and that to enforce the same was to deny to Southeastern Express Company due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States:

(*a*) Because said Section 21 is vague, indefinite and void for uncertainty. Said Section 21 fails to define what constitutes first, second and third class railroad tracks for the purpose of an
60 express business; no tests are provided by said law for classifying railroads into first, second and third classes in relation to and in connection with express business, which may be done over them. And the law in question further fails to provide any method or procedure by which it can be ascertained within reason and just limits what railroad tracks are first, second or third class, as a basis for a proper measure for assessing a privilege tax on account of the express business which may be done over railroad tracks of either any or all of the classes respectively.

(*b*) Said Section 21, while plainly manifesting the legislative intent to levy a privilege tax upon express companies according to the business done, provides no reasonable or certain standard for classifying railroad tracks in relation to and in connection with the express business which may be done over them, but arbitrarily graduates the tax in question according to mileage upon first, second or third class railroad tracks.

(*c*) Said Section 21 fails to provide any measure either by way of amount or value of the express business done over railroad trackage, to the end that such measure may constitute a standard by which railroad trackage can be classified into the three classes respectively for the purpose of levying privilege taxes upon express companies doing business over railroad trackage, the amount of which taxes will bear a reasonable relation to the value of the privilege exercised in each instance.

2.

Said Supreme Court of Mississippi erred in holding that the first, second and third class railroad tracks, referred to in Section 21, Chapter 104, Laws of 1920 (Hemingway's Supplement, 1921, Section 6512) "are those required by Section 45, Chapter 104, Laws of 1920 (Hemingway's Supplement, 1921, Section 6573) to be so
61 classified by the Railroad Commission":

(*a*) Because Section 45, in question, is a separate independ-

ent enactment, distinct from and unconnected with Section 21, and there is contained in neither Section nor elsewhere in the laws of the State of Mississippi any language showing a legislative intention to connect the provisions of the two Sections each with the other or to engraft one upon the other.

(*b*) Because said Section 45 expressly provides that the classification of railroads, therein provided for, is solely for the purpose of levying privilege taxes on railroads.

(*c*) Because said Section 45, classifies railroads in Mississippi for the purpose of levying taxes thereon according to their charters and the gross earnings of each; and the standards of classification prescribed as to railroads, have no relation to nor bearing whatever upon express companies, and the express business which may be done over railroads; and there is no warrant for applying the classification of railroads made under said Section 45, for the special purpose therein expressed, to the assessment of privilege taxes against express companies, on account of the business done by them over railroad tracks.

3.

Upon the assumption that the Supreme Court of Mississippi could correctly hold that the classes of railroads referred to in Section 21, Chapter 104, Laws of 1920 (Hemingway's Supplement, 1921, Section 6512) are those required by Section 45, Chapter 104, Laws of 1920 (Hemingway's Suplement, 1921, Section 6573) to be so classified by the Railroad Commission, the Court erred in holding that the classification made in Section 45 by the Railroad Commission of railroads over which Southeastern Express Company operates could be applied to said express company in assessing and enforcing
62 a privilege tax against it, without denying said Southeastern Express Company due process of the law and the equal protection of the law; and erred in not holding that the classification made under Section 45 was contrary to the Fourteenth Amendment to the Constitution of the United States when applied to Southeastern Express Company;

(*a*) Because said classification, when applied to express companies, is arbitrary and has no just relation to the business done by express companies over railroads.

(*b*) Because the measure and standard of classification provided in Section 45 are based upon the charters and gross earnings of railroads; and neither the charters nor gross earnings of express companies are taken into account or regard in such classification, nor are other standards or measure appropriate to express companies provided in the law.

(*c*) Because the classification of railroads made by Section 45, when applied to express companies, grossly discriminates against said express companies as between them and railroads, for the reason that neither the charters nor gross earnings of express companies are given consideration in classifying the railroads over which express companies may operate and do business.

(*d*) Because said Section 45 makes no provision for notice and hearing to express companies in making the classification of railroads

into first, second and third classes; and although facts are considered and determined by the Railroad Commission of Mississippi in classifying railroads into the several classes, express companies are afforded no opportunity by law to be heard in connection with the classification of railroads; nor are they given opportunity by law to present facts relevant to and bearing upon such classification by railroads either as such or as agencies over which express business may be done.

63 (c) Because under Section 21 of chapter 104 of the Laws of 1920 (Hemingway's Supplement, 1921, Section 6512) Southeastern Express Company was required to pay a privilege tax before entering business on May 1st, 1921 for a full year ending April 30th, 1922, and the classification of railroads provided by said Section 45 is required to be made on or before the 1st Monday in August of each year; and it further provides that the privilege tax based upon said annual classification should be paid on or before the 1st day of December in each year. There being no provision of law in Mississippi for the payment of a privilege tax for a portion of a year, it is apparent that Southeastern Express Company, under the law, could not receive the benefit of the classification, made by the Railroad Commission, of railroads into classes in the year 1921, for eight months of the year 1921 and four months of the year 1922, during which periods it would be compelled to pay under a classification made by the Railroad Commission in 1920; and it further clearly appears that the same irregularity, discrepancy and discrimination will continue for each succeeding year if said privilege tax is enforced against it, although railroads receive the benefit of the classification made in August of each year previous to the full period of the particular year for which the tax will be exacted of them; and Southeastern Express Company is thus illegally discriminated against and denied the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States.

4.

Said Supreme Court of Mississippi erred in holding that Section 73, Chapter 104, Laws of 1920 (Hemingway's Supplement, 1921, Section 6630) does not violate the Fourteenth Amendment to the Constitution of the United States and deprive Southeastern
64 Express Company of the equal protection of the law, and in entering judgment against said Southeastern Express Company for the damages or penalty provided in said Section 73;

(a) Because said Section 73 arbitrarily and unreasonably discriminated against said Southeastern Express Company, in that it is provided therein that it shall pay the privilege tax imposed by Section 21 before entering business while all other express companies corporations, companies and persons, subject to privilege taxes, already in business are given thirty (30) days within which to pay the same; there existing no valid reason or justification in law or in fact why such distinction should be made and why Southeastern Express Company should be required to pay the tax or

incur the damages or penalty before beginning business, while those already in business are allowed (30) days in which to pay privilege taxes before becoming subject to damages or penalty.

5.

Said Supreme Court of Mississippi erred in affirming the judgment of the lower Court and in rendering judgment against Southeastern Express Company for the privilege tax sued for.

6.

Said Supreme Court of Mississippi erred in reversing the judgment of the lower Court, holding that said Southeastern Express Company was not subject to the damages or penalty sued for, and in entering judgment against it for said damages or penalty.

Wherefore, for this and other manifest errors appearing in the record, said Southeastern Express Company prays that the judgment of the said Supreme Court of Mississippi be reversed,
65 set aside and held for naught, and that judgment be rendered in its favor sustaining its rights, under the Constitution of the United States and otherwise; and Southeastern Express Company also prays a judgment for its costs. Sanders McDaniel, H. L. Greene, Bozeman & Cameron, Attorneys for Southeastern Express Company.

[File endorsement omitted.]

66 In the Supreme Court of Mississippi.

[Title omitted.]

Supersedeas Bond.

Know all men by these presents, That we, Southeastern Express Company, a corporation of the State of Alabama, as principal, and U. S. Fidelity & Guaranty Co., Surety Company, a corporation of the State of Maryland, as Surety, are held and firmly bound unto Stokes V. Robertson, State Revenue Agent, his heirs, executors, administrators, assigns and successors in office, in the sum of Twelve Thousand and No/100 ($12,000) Dollars for the payment of which well and truly to be made we hereby jointly and severally bind ourselves, our respective assigns and successors firmly by these presents.

Whereas, lately at a hearing before the Supreme Court of Mississippi, in a suit pending in said Court, between the said Stokes V. Robertson, Revenue Agent, and said Southeastern Express Company a final judgment was rendered against Southeastern Express Company, and Southeastern Express Company seeks to prosecute its writ of error to the Supreme Court of the United States to reverse said final judgment;

Now, therefore, the condition of this obligation is such that if the said Southeastern Express Company shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to

make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

67 In witness whereof, the said Southeastern Express Company, as principal, and United States Fidelity & Guaranty Co. as surety, have hereunto set their hands and seal, this 18th day of December, 1922. Southeastern Express Company, Principal, by Sanders McDaniel, H. L. Greene, Bozeman & Cameron, Attorneys. (Seal.) United States Fidelity & Guaranty Co., Surety, by W. O. Ludlow, Attorney-in-fact. (Seal.) Attest: W. J. Buck, Clerk Supreme Court of Miss.

The foregoing bond is hereby approved, and it is ordered that the same operate as a supersedeas.

This Dec. 18, 1922. Sydney Smith, Chief Justice Supreme Court of Mississippi.

68 In the Supreme Court of Mississippi.

[Title omitted.]

Precipe for Transcript.

[Filed Dec. 21, 1922.]

To the Clerk of the Supreme Court of Mississippi:

Southeastern Express Company, plaintiff in error, hereby directs you to forward to the Supreme Court of the United States with the writ of error the following parts of the record in this case:

1.

The original writ of error and citation based and issued thereon.

2.

Copies of the petition for the writ of error, the order allowing writ of error, assignment of errors, supersedeas bond and this præcipe.

3.

The judgment and opinion of the Supreme Court of Mississippi.

4.

Copies of the entire transcript of the record in the Supreme Court of Mississippi from the Circuit Court of Lauderdale County, Mississippi.

Sanders McDaniel, H. L. Greene, Bozeman & Cameron, Counsel for Southeastern Express Co.

Service of the above and foregoing precipe is hereby acknowledged, copy thereof received, and all other and further notice and service is waived.

We agree that the record specified in the foregoing precipe
69 is all that is necessary to a clear understanding of the errors complained of.

This 19th day of December, 1922. Amis & Dunn, Attorneys for Stokes V. Robertson, State Revenue Agent, Defendant in Error.

[File endorsement omitted.]

70 **Clerk's Certificate.**

STATE OF MISSISSIPPI,
Hinds County:

I, W. J. Buck, Clerk of the Supreme Court of the State of Mississippi, being the Court of said State which has highest, last and final jurisdiction of all pleas and causes pending in the Courts of said State, do hereby certify that the foregoing are full, true and correct copies of all papers, each and all of them constituting the record in the said Supreme Court of the State of Mississippi in the case of Stokes V. Robertson, State Revenue Agent vs. Southeastern Express Co., No. 22,858 on the docket of said court, all of which are now on file in my office and taken together constitute the record in said cause; I further certify that the foregoing record contains a true and correct copy of the record as called for and designated by the præcipe filed in said cause.

Given under my hand with the seal of said Court affixed at offices in the City of Jackson, Mississippi, this the 23rd day of December, A. D., 1922. W. J. Buck, Clerk of the Supreme Court of Mississippi. [Seal of the Supreme Court, State of Mississippi.]

Fee Bill, Clerk Supreme Court of Mississippi.

I certify that I have received payment for the foregoing transcript, from Southeastern Express Co., the following:

21,000 words at 15 cts. per hundred	$31.50
Making Index	.50
Certificate	.50
Expressage	.50
	$33.00

I further certify that I have received in addition to the $33.00 mentioned the sum of $10.00 for carbon copy delivered to attorneys for Southeastern Express Co. per agreement, making a total of $43.00 paid me.

Witness my hand and seal of said Supreme Court at Jackson, this the 23rd day of December, 1922. W. J. Buck, Clerk of Supreme Court of Miss. [Seal of the Supreme Court, State of Mississippi.]

Endorsed on cover: File No. 29,352. Mississippi Supreme Court. Term No. 802. Southeastern Express Company, plaintiff in error, vs. Stokes V. Robertson, State revenue agent. Filed January 18th, 1923. File No. 29,352.

In The Supreme Court of The United States.

SOUTHEASTERN EXPRESS COMPANY.
Plaintiff in error

vs.

STOKES V. ROBERTSON, STATE REVENUE AGENT,
Defendant in error

Number 201

October Term, 1922.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

BRIEF FOR SOUTHEASTERN EXPRESS COMPANY, PLAINTIFF IN ERROR.

SANDERS McDANIEL.
A. S. BOZEMAN.
H. L. GREENE.

Attorneys for Southeastern Express Company, Plaintiff in Error.

Byrd Printing Co., Atlanta.

INDEX.

CASES CITED.

In The Supreme Court of The United States.

SOUTHEASTERN EXPRESS COMPANY.
Plaintiff in error

vs.

STOKES V. ROBERTSON, STATE REVENUE AGENT,
Defendant in error

Number 802.

October Term, 1922.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

BRIEF FOR SOUTHEASTERN EXPRESS COMPANY, PLAINTIFF IN ERROR.

STATEMENT OF CASE.

Southeastern Express Company began operations in the State of Mississippi on May 1st, 1921. Under contracts with certain railroads, its express business (embracing both interstate and intrastate commerce) was to be conducted according to the custom and practices of express companies generally, and when it began business and operations in the State of Mississippi, it unquestionably became subject to all of the valid laws of that State, and its properties and business became subject to all valid taxing laws applicable to express companies.

The validity, however, of a certain statute of the State undertaking to impose what is termed a privilege tax upon

express companies was questioned by Southeastern Express Company, and, as a result of the dispute regarding the constitutionality of the privilege tax statute, the present litigation was instituted.

Section 21 of Chapter 104 of the Laws of the State of Mississippi of 1920, (Hemingway's Code Supplement 1921, Section 6512) provides as follows:

> "Express Companies—On each Express Company transporting freight or passengers from one point to another in this State $500.00, and $6.00 per mile on all first class railroad tracks in this State over which the business is operated, and $3.00 per mile on all second or third class railroad tracks in this State over which the business is operated."

Section 73 of Chapter 104 of the Laws of Mississippi of 1920 (Hemingway's Code Supplement 1921, Section 6630) provides as follows:

> "Damages in case of failure to procure license—All persons, firms, partnerships or corporations liable for privilege taxes, who shall fail to procure the license therefor before beginning the business taxed, or who shall fail to renew, during the month in which it is due, the license on a business on which he has theretofore paid a privilege tax, shall, in each or either such instance, be liable for double the amount of the tax, and it is hereby made the duty of the Tax Collector of the County in which such business is conducted to collect the amount, issue a separate license therefor, and to endorse across its face the words, 'Collected as Damages'."

Southeastern Express Company did not before it began business on May 1st, 1921, pay any privilege tax, and did not obtain the license which issues upon such payment. The defendant in error, Stokes V. Robertson, acting in his

capacity as State Revenue Agent, made an assessment against the Express Company for the sum of $4,325.33 as privilege tax under Section 21 of Chapter 104 of the Laws of the State of Mississippi of 1920, above quoted, and also assessed a like amount as damages under Section 73 of Chapter 104 of the Laws of Mississippi of 1920, above quoted. Southeastern Express Company, on May 17th, 1921, tendered to defendant in error the amount assessed as privilege tax, but declined to pay the amount assessed as damages, and as a result, the defendant in error, after refusing the tender in question, brought suit for the aggregate amount of the privilege tax assessed and the damages assessed in the Circuit Court of Lauderdale County, Mississippi.

The declaration filed by defendant in error was demurred to by plaintiff in error, and plaintiff in error also filed pleas to such declaration. An agreed statement of facts was entered into in the Court of original jurisdiction, and under instructions from the Court at the trial, the jury returned a verdict in favor of the State Revenue Agent for the amount of the privilege tax assessed, but returned a verdict against the State official and in favor of the Express Company insofar as the damages assessed were concerned.

Defendant in error, Robertson, appealed from the judgment of the Circuit Court which failed to award damages in his favor for the amount assessed against the Express Company as damages on account of its failure to pay the privilege tax before beginning business, and the Express Company took a cross-appeal to the Supreme Court of Mississippi from the judgment making it liable for the privilege tax assessed.

The Supreme Court of Mississippi affirmed the judgment of the Court making the Express Company liable for

the privilege tax, but reversed the lower Court upon its finding that the Express Company was not also liable for the damages sued for, and the State Supreme Court entered judgment both for the tax and the damages sued for. See Robertson, State Revenue Agent, vs. Southeastern Express Company, 94 Southern, Page 210. (Pages 28-31 Printed Record.)

The grounds of attack made n the Supreme Court of Mississippi by the Express Company upon the privilege tax and damages assessed are grouped and stated by that Court in the opinion rendered in the case.

The Supreme Court of Mississippi, as will be noted in its decision, held adversely to all of the claims of the Express Company, and it is well to specially note at the threshold of the case this particular holding of the Court:

> "We are of the opinion that the first, second and third class railroads referred to in Section 21, Chapter 104 of the Laws of 1920 (Hemingway's Code Supplement 1921, Section 6512) are those required by Section 45, Chapter 104, Laws of 1920, (Hemingway's Code Supplement, 1921, Section 6573) to be so classified by the Railroad Commission."

Section 45 of Chapter 104 of the Laws of Mississippi 1920, above referred to, provides as follows:

> "Railroads.—That Section 3856 of Chapter 114 of the Code of 1906, levying privilege taxes on Railroads be, and the same is hereby amended so that for the purpose of levying a privilege tax on Railroads, such Railroads are divided into four classes—first, second, third and narrow gauge, and privilege taxes levied on them as follows: On each railroad of the first class, per mile $45.00; on each railroad of the second class, per mile $25.00; on each railroad of the

third class, per mile $10.00; on each narrow gauge railroad, per mile $2.50.

The Railroad Commission shall annually, on or before the first Monday in August, classify the several railroads according to their charters and the gross earnings of each, and the privilege taxes thereon shall be paid on or before the 1st day of December, and the finding of the said Railroad Commission shall be certified to the Auditor of Public Accounts and the Chancery Clerk of the County through which each road, or roads run, and any person, or persons, natural or artificial, who shall exercise any of the privileges taxed herein without first paying the tax and procuring the tax or license as required by law, shall be subject to the pains and penalties imposed by Section 3894 of the Code of 1906, and to such other pains and penalties as may be otherwise provided by law."

Following the decision of the Supreme Court of the State of Mississippi, this writ of error was seasonably taken and is being prosecuted under Section 237 of the Judicial Code, the basis of the writ of error being that the statutes drawn in question and upheld by the Supreme Court of Mississippi are in conflict with the Constitution of the United States.

SPECIFICATION OF ERRORS RELIED UPON.

Omitting all questions before the Supreme Court of Mississippi as to which the determination of that Court is binding, the errors relied upon here will be summarized as follows:

1.

Plaintiff in Error contends that the statute of the State of Mississippi quoted in the statement of the case, which

imposes the privilege tax upon it as an express company, denies to it due process of law,—

(a) Because such statute is so vague, uncertain and indefinite as to be void.

(b) Because the Statute as to so much of the privilege tax as is assessed against it at $6.00 per mile on all first class railroad tracks over which its business is operated in the State of Mississippi, and $3.00 per mile on all second and third class railroad tracks over which the business is operated, provides no measure or standard by which it can be determined as to what are first class railroad tracks for the doing of an express business, or as to what are second and third class railroad tracks for the doing of an express business. And no provision of law is elsewhere found by which it can be ascertained as to what are first class railroad tracks and second and third class railroad tracks in connection with an express business.

(c) Although the Supreme Court of Mississippi has held that "First, second and third class railroads" referred to in Section 21, Chapter 104, Laws of 1920, (Hemingway's Code Supplement 1921, Section 6512) are those required by Section 45, Chapter 104, Laws of 1920, (Hemingway's Code Supplement 1921, Section 6573) to be classified by the Railroad Commission, and although the effect of said holding may be to engraft upon said Section 21, Chapter 104, Laws of 1920, Section 45 of the same Chapter and laws, even assuming that the connection between the section imposing a privilege tax upon express companies with the section of law classifying railroads into four classes for the purpose of levying privilege taxes on railroads be thus conclusively established by the decision of the Supreme Court of Mississippi so as "not to be open to question" in this Court, there still

is found neither measure nor standard for classifying railroad trackage for the purpose of taxing the express business operated over such trackage, inasmuch as the classification of railroads under Section 45, Chapter 104, etc. is for the sole purpose "*of levying a privilege tax on railroads*".

(d) Because even upon the assumption that the classification of railroads into classes provided for in Section 45, Chapter 104, etc., despite the fact that such classification is "for the purpose of levying a privilege tax on railroads" can be extended to the end that the classifications made under Section 45 will govern the imposition of privilege taxes upon express companies under Section 21, there is no provision in the law even when supplemented in this way for notice and hearing to express companies when the classification of railroads is made by the Mississippi Railroad Commission.

2

Plaintiff in error contends that it is denied the equal protection of the laws because:

(a) Under the decision and judgment of the Supreme Court of the State of Mississippi, damages in an amount equal to the privilege tax are allowed against it because it failed to pay the privilege tax before entering business on May 1st, 1921, while other express companies as well as all other persons and corporations subject to privilege taxes already in business are allowed thirty days after the privilege taxes accrue annually within which to pay the same. Plaintiff in error's contention is that the discrimination under the law in this respect is arbitrary and unwarranted by any sound reason or principle of distinction.

(b) Because when the classification of railroads provided for under Section 45, Chapter 104 of the Laws of Mississippi of 1920 is made by the Railroad Commission, railroads are accorded the right to be heard upon the facts and criteria governing such classification; while, upon the other hand, express companies are not accorded a hearing when the classification is made, and are not allowed to present facts either as to the value of particular trackage relative to an express business, or as to such value according to the criteria prescribed by Section 45 which govern the classification for the purpose of levying privilege taxes upon railroads.

BRIEF OF THE ARGUMENT.

Character of Tax.

Section 21, Chapter 104 of the Laws of Mississippi of 1920 is quoted in full in the statement heretofore made. Even a casual examination of Section 21 makes it apparent that the Legislature of the State of Mississippi in enacting the law therein contained exerted its power to tax, and that Section 21 which seeks to exact privilege taxes of express companies is not a mere police regulation.

It is apparent that a portion of the contemplated tax is levied in a lump sum, to-wit: $500.00, and to that extent represents a more or less arbitrary legislative pre-adjudgment; but it is further apparent that the balance of the tax is sought to be fixed according to some measure, the endeavor being to graduate the balance of such tax, to-wit: $6.00 per mile on all first class railroad tracks over which an express business is operated, and $3.00 per mile on all second and third

class railroad tracks according to some scale, the tax per mile varying radically according as to whether the business be done over what the statute denominates as "first class railroad tracks" or whether it be done over "second or third class railroad tracks."

The decision of the Supreme Court of Mississippi in the case of—

New Orleans, M. & C. Railroad Company vs. State, 110 Mississippi, 290; 70 Southern 355,

construes the whole Chapter of the Laws of Mississippi which, at the time such decision was rendered, was Chapter 102 of the Laws of 1912, and which corresponds to and with certain amendments, is the same as Section 104 of the Laws of 1920, (in which Section 21 appears) and which imposes privilege taxes upon various occupations. In the cited case, the Court in construing that particular Section of the Chapter, says:

> "The whole act and the chapter in which it appears in our Code shows a general scheme for imposing an excise or privilege tax on various occupations, businesses and professions within the confines of our state, *to raise revenues in support of our state government,* and the act assumes, of course, that the occupation or business taxed is one to be done or carried on within the State." (Italics ours.)

The fact that the statute is designed to raise revenue furnishes conclusive test that in enacting Section 21, the Mississippi Legislature was acting under its taxing powers, and that Section 21 was passed for the purpose of levying a tax and was not intended as a police regulation.

The exaction of a license tax as a condition to the doing of any particular business is a tax on the occupation; and a

tax on the occupation of doing business is in essence a tax on the business.

> *Leloup vs. Port of Mobile, 127 U. S. 640, 645; Note 60 L. R. A., 691.*
>
> *Postal Telegraph-Cable Company vs. Adams (Miss. case) 14 Southern 36; affirmed in 155 U. S. 688.*

It is further apparent that the portion of the tax to be levied at $6.00 per mile on first class railroad trackage and at $3.00 on second and third class railroad trackage was intended to have a direct relation to the value of the privilege exercised. Evidently the Legislature considered that the operation of an express business over first class railroad tracks was of substantially greater value than the operation of an express business over second and third class railroad tracks; and it is further fairly deducible that it was in the Legislative mind, in making the difference, to do so according to the variations in the express business done over a variety of railroad trackage. In other words, it must have been the legislative purpose to adjust and measure the tax according to the express business. It would be inconceivable that the Legislature imposed double the tax per mile in one instance over what it would be in another unless the business done over a particular mileage of railroad trackage when compared with that done over some other mileage justified the variance in the amount of the tax. It would further seem to be inconceivable that in taxing express companies according to certain classes of railroad trackage and in varying the tax according to classes of trackage, the Legislature could have had in mind any other standard or measure than that furnished by the business of the express company and the value of the privilege.

We assert, therefore, that the tax prescribed by Section 21, Chapter 104 of the Laws of Mississippi represents a tax upon the business of express companies, and that with the exception of $500.00, such tax is measured according to the amount or value of the business, and that to this end, the unfixed and uncertain portions of the tax are to be made fixed and certain by a classification of railroad trackage over which express companies operate according to the value of the operations to express companies over particular classes of railroad trackage.

Section 21 is to be found in a Chapter of the Laws of the State of Mississippi which taxes "Privileges." A portion of this tax, insofar as express companies are concerned, is manifestly measured according to the value of the privileges exercised. The value of the privilege exercised by an express company must be according to the amount or profitableness of the business done, and, therefore, the business done by the express company is the sole criterion for ascertaining the value of the privilege and of measuring the tax accordingly.

THE LAW OF MISSISSIPPI WHICH SEEKS TO IMPOSE PRIVILEGE TAXES UPON EXPRESS COMPANIES IS VOID FOR UNCERTAINTY AND IS, THEREFORE, UNENFORCEABLE.

Although Section 21, Chapter 104 of the Laws of Mississippi of 1920 stands apart from Section 45 of the same Chapter, the Supreme Court of Mississippi has held in this case that the first, second and third class railroads referred to in Section 21 are those required by Section 45 to be classified by the Railroad Commission. The construction

of the Mississippi Statute by the highest Court of that State is accepted as binding here, and in this view of the matter, the gap between Section 21 and Section 45 is bridged, and Section 45 in consequence is engrafted upon Section 21. Our statement that Section 45 has been engrafted upon Section 21 by the decision of the Supreme Court of Mississippi is measured. Section 45 does not itself state what are first class railroads and what are second and third class railroads (or, using the verbiage of Section 21, what are first class railroad tracks and what are second or third class railroad tracks). Section 45 provides that the Railroad Commission shall classify railroads into certain classes. In other words, Section 45 provides the machinery for a classification of railroads, and if the ultimate result of the classification by the Railroad Commission of Mississippi is to be binding upon express companies, the method by which the result is obtained must inevitably be considered as a part of the taxing machinery under which privilege taxes are exacted of express companies. The result of the process by which railroads are classified under Section 45 cannot be applied to Express Companies, but the process by which the result is obtained must be considered in determining the validity of the privilege tax when applied to these companies.

As we have urged, there was a reason in the legislative mind when the privilege tax to be imposed on Express Companies was fixed at $6.00 per mile on first class railroad tracks, and at only $3.00 per mile where the operations were over second and third class railroad tracks.

When therefore, the Supreme Court of Mississippi adopts the classification of railroads made under Section 45 as the basis for levying the privilege tax upon express companies, the terms of Section 45 thus joined to Section 21 must

be taken into account in testing the constitutionality of the law. It is submitted that under the construction announced by the Supreme Court of Mississippi in this case the law is involved in as much uncertainty as it was prior to such construction. The duty which we conceive is devolved upon *this Court* is to determine whether under the construction made by the Supreme Court of Mississippi there is evolved a reasonably certain law for the levying of privilege taxes upon express companies.

Section 45 expressly provides that the classification of railroads therein delegated to the Railroad Commission is for the purpose of levying privilege taxes upon railroads. Furthermore, the statute provides the factors which shall enter into such classification, to-wit: the gross earnings of railroads and their charter privileges. Manifestly, these factors or criteria cannot be held with any degree of certainty to apply to express companies. Cognizance must be taken of the fact that the volume of freight business over particular railroad trackage would not measure the volume of express business over the same trackage. Necessarily, it must be assumed and can properly be assumed that in certain sections freight traffic might be heavy and express traffic light, and the reverse of this is also true. The same could be said with regard to passenger business done by railroads, and while the privilege tax by Section 21 is laid on express companies transporting freight or passengers from one point to another, as a matter of fact, express companies do not transport passengers and the freight which they do transport is a different character of freight from that transported by railroads.

That the express business is separate and distinct from the railroad business is recognized by the Legislature of Miss-

issippi in that a separation of the two has been made for taxing purposes. That a common carrier by express is separate and distinct from a common carrier by railroad is recognized by the authorities generally.

> *In Re: Express Companies, 1 I. C. R. 677, 682, 683; Wells Fargo & Company vs. Taylor, 254 U. S. 175.*

In the case of–

> *Pacific Express Company vs. Seibert, 142 U. S., 339,*

the Court draws a clear distinction between express companies and railroad companies for purposes of taxation. In the opinion by Mr. Justice Lamar, on pages 353, 354, after directing attention to the distinction between express companies, upon the one hand, and railroad and steamboat companies upon the other, in connection with the particular law involved, it is said, on page 354:

> "This distinction clearly places express companies defined by this Act in a separate class from companies owning their own means of transportation. They do not do business under the same conditions, or under similar circumstances. *In the nature of things, and irrespective of the definitive legislation in question, they belong to different classes.*" (Italics ours.)

In the case of–

> *Gulf & S. I. Railroad Co. vs. Adams, State Revenue Agent, 83 Miss. 320; 36 So. 144, 145,*

it was distinctly held by the Supreme Court of Mississippi that the classification of railroads to be made for the purpose of levying privilege taxes on railroads was to be made with regard to charter exemption claims as well as to gross

earnings, and it is incontestably true that privileges and exemptions which might be given to railroads under their charters could not and would not avail for the benefit of express companies which by contracts might do an express business over railroads.

The law of Mississippi, therefore, even under the construction placed upon it by the Supreme Court of that State is still lacking in certainty inasmuch as it does not provide for a classification of railroads for the purpose of taxing express companies. There is still a lack of machinery when express companies are included within the provisions of Section 45, and the law remains uncertain and arbitrary insofar as express companies are concerned in that it fails to provide any measure of the amount or value of the express business done over any particular railroad trackage to the end that such measure or value might constitute a standard by which railroad trackage could be classified for the purpose of taxing express companies.

In State vs. Cook (Ind. App.) 59 N. E. 489, the Statute being considered by the Court prohibited the loading of more than two thousand (2,000) pounds on a narrow tired wagon or more than two thousand five hundred (2,500) pounds on a broad tired wagon; and such statute was held void because it fixed no standard for determining what was a narrow or what was a broad tire. The Court on page 490 of the Reporter said:

> "Where terms of a statute are so uncertain as to their meaning that the Court cannot discern with reasonable certainty what is intended, it will pronounce the enactment void;" citing:
>
> *Blacks Interp. Laws, Par. 36;*
> *Cheezem vs. State, 2 Ind., 149;*
> *King vs. State, 2 Ind., 523.*

In the case of State vs. Partlow, 91 N. C., 550, the Court said:

> "Whatever may be the views and purposes of those who procure the enactment of a statute the Legislature contemplates that its intention should be certain from its words embodied in it, and Courts are not at liberty to accept the understanding of an individual as to the Legislative intent."

Mr. Justice Nelson, in the case of Powers vs. Barney, Fed. Case No. 11, 361, (5 Blatchf 202) said:

> "Duties are not imposed upon a citizen upon vague or doubtful interpretations."

This language was cited and approved in–

United States vs. Watts, Federal Case No. 16,653;

Vicksburg Railroad Company vs. State, 62 Miss. 105;

Mayor vs. Hartridge, 8 Ga., 23;

Lewis' Sutherland Statutory Construction, Vol. 2, page 999, par. 537;

Rice vs. United States, 53 Federal, 912;

Hartranft vs. Wiegmann, 121 U. S., 609, 616.

In the case of United States vs. Isham, 17 Wallace 496, the Court, in its opinion on page 504, pronounces this dictum:

> "If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption, because, in the language of Pollock, C. B., in Girr v. Scudds, 'a tax cannot be imposed without clear and express words for that purpose'."

In the case of Powers vs. Barney, supra, a decision from the Circuit Court of the United States for the Southern District of Georgia, the second headnote is as follows:

"In cases of serious ambiguity in the language of a tariff act, or doubtful classification of articles, the construction must be in favor of the importer, *as duties are never imposed upon the citizen upon vague or doubtful interpretation.*" (Italics ours.)

In *United States* vs. *Wigglesworth*, Federal Case No. 16690, (2 Story, 369,) Judge Story, speaking for the Court, says:

"It is, as I conceive, a general rule in the interpretation of all statutes levying taxes or duties upon subjects or citizens not to extend their provisions by implication beyond the clear import of the language used, *or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analysis.*

In every case, therefore, of doubt, such statutes are construed more strongly against the Government, and in favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed beyond what the statutes expressly and clearly import.

Revenue statutes are not in just sense either remedial laws or laws founded upon any permanent, public policy, and, therefore, are not to be liberally construed." (Italics ours.)

The foregoing quotation from Judge Story's decision was cited with approval in the following cases:

United States vs. Athens Armory, Federal Case, No. 14,473;

Devereaux vs. City of Brownsville, 29 Federal 753;

Memphis vs. Bing (Tenn.) 30 S. W. 746;
In Re: Enston's Estate (N. Y.) 21 N. E., 88;
Green vs. Holway, (Mass.) 101 Mass. 248;

Schilling vs. State (Ind.) 18 N. E. 682;
State vs. Pullman Company (Wis.) 23 N. W., 873;
Benziger vs. United States, 192 U. S. 38,55.

The uniform principle of law is that a statute must be construed according to the terms thereof, and that doubts of its validity should be resolved in favor of the tax payer.

Lewis' Sutherland Statutory Construction 2nd Ed. Volume 2, page 998,

quoting from the English case of Gurr vs. Scudd, 11 Exc. 190, 192, and also from a comparatively late case before the House of Lords (*Partington* vs. *Attorney General*, L. R. 4 H. L. Case 122.) The quotation from the House of Lords case is as follows:

> "The principle of all fiscal legislation is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case may otherwise appear to be. In other words, if there is admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, *where you can simply adhere to the words of the statute.*" (Italics ours.)

See also–

Hilburn vs. St. Paul, M. & M. Railway Co., 23 Mont. 229; 58 Pac. 551, 555;
Treat vs. White, 181 U. S. 264, 267;
Board of Supervisors vs. Tallant, 96 Va. 723; 32 S. E. 479;
Turnpike Railroad Co. vs. Thomas (Ky.) 3 S. W. 907;

Combined Saw & Planer Company et al vs. *Flournoy*, 88 Va., 1029; 14 S. E. 976.

We assume, as we have endeavored to point out, that unquestionably in the fixation of a privilege tax upon express companies upon the basis of the mileage of first, second and third class railroad tracks over which express business might be operated, the Legislature had in mind a classification according to the value of the express business upon particular railroad trackage. If the premise is sound, then the amount of the tax must depend upon the ascertainment of facts with respect to the express companies, and the classification of railroads must be with respect to the express business done over them.

Not only does Section 45 fail to provide any method for making the classification with regard to the business of express companies for the purpose of levying privilege taxes upon express companies, but it expressly provides that the classification shall be for the purpose of levying privilege taxes upon railroads.

Therefore, the tax here is laid not according to any certain, definite and precise statutory terms, but under statutes which are lacking in precision, certainty and definiteness.

DUE PROCESS OF LAW IS NOT AFFORDED TO PLAINTIFF IN ERROR IN THE IMPOSITION OF THE PRIVILEGE TAX AND PENALTY UPHELD BY THE SUPREME COURT OF MISSISSIPPI.

As we have argued, in holding that Section 45 of Chapter 104 of the Acts of the Legislature of Mississippi of 1920

provides for the classification of railroads for the purpose of taxing express companies under Section 21 of Chapter 104, that Court inevitably combined the two Sections, and, in consequence, the terms of Section 45 must be resorted to and tested for a determination of the legal adequacy, efficiency and validity of the privilege tax law when applied to express companies. It is to be noted that no provision has been made for notice to express companies, or opportunity for them to be heard in classifying railroads either (a) as to the amount of the express business or the value of the privilege to express companies over particular railroad trackage; and (b) as to the facts which are required to be taken into consideration by Section 45 in classifying railroads for the purpose of assessing privilege taxes against railroads.

In other words, we make two distinct contentions: one being that express companies ought to be afforded notice and opportunity to be heard as to the value of the *express business itself* over various railroad trackage, and that a classification of railroads for levying privilege taxes under Section 21 should be made according to the express business; the other being that in any event, even if classification of railroads should be confined to the measures and standards fixed by Section 45, inasmuch as express companies are to be taxed according to the classification, they should have the opportunity to be heard when railroads are being classified and the facts governing such classification under Section 45 are being passed upon by the Railroad Commission.

The issue with regard to such contentions was sharply drawn in the Court of original jurisdiction and in the Supreme Court of Mississippi, and we beg leave to quote from a pleading filed by the defendant in error in the lower Court

in order to show exactly the position taken by the State Revenue Agent on the issue.

In a reply or replication, the State Revenue Agent says: (See pages 15 and 16 Printed Record in this case.)

"Plaintiff further says that by Chapter 102 of the Laws of Mississippi of 1912, it is made the duty of the Railroads of the State of Mississippi to annually on or before the first Monday in August of each year classify the several railroads within the State of Mississippi according to their charter and the gross earnings of each and that the classification so made by the State Railroad Commission shall be certified to the Auditor of Public Accounts and to the Chancery Clerk of the County through which each road or roads run; that by the provision of said Chapter 102 of the laws of 1912, the said Railroad Commission of the State of Mississippi is required to classify such railroads and that in performance of said duty the said State Railroad Commission did on or before the first Monday in August, 1920, make the classification of railroads within the State of Mississippi as required by said Act, and that the act of the said Railroad Commission in making such classification became and was a public record in the office of the State Auditor of Public Accounts on and before the first day of May, 1921, and that the defendant could have ascertained the true and exact amount of privilege taxes it should pay on its intrastate business as an Express Company within the State of Mississippi with ease and convenience had it chose to so have done. That the Supreme Court of the State of Mississippi had prior to the first day of May 1921 construed said Chapter 102, Laws of 1912, in the case of the New Orleans and Northeastern Railroad Company versus the State, reported in 110 Miss. at page 290, as providing a lawful and constitutional method for the classification of railroad tracks within the State

of Mississippi, and as being binding upon the State authorities, and all persons affected by the decision of the State Railroad Commission, and the plaintiff therefore says that the classification of railroads as made by the State Railroad Commission on or before August 1, 1920, constituted a legal and valid classification of the railroad tracks within the State of Mississippi, and that such Act constituted a definite, certain and exact criterion when construed in connection with Section 21, Chapter 104 of the Acts of the Legislature of Mississippi of 1920 as to the amount of privilege taxes the defendant was required to pay before it began business in Mississippi on the 1st day of May, 1921; and the plaintiff therefore denies that said Section 21, Chapter 104 of the laws of Mississippi, 1920, is unconstitutional in that it permits the taking of property without the due process of law contrary to the Fourteenth Amendment to the Constitution of the United States."

In its final analysis, the claim of defendant in error is in substance that when the Railroad Commission of the State under Section 45 makes a classification of railroads in the way provided in such section, such classification becomes absolute and binding upon express companies in the assessment of privilege taxes against them, without regard to the fact that such classification of railroads is made without notice to express companies, and without opportunity being given them to be heard.

This view would seem to disregard the fact that with the exception of the sum of $500.00, the privilege tax is graduated according to the classes of railroads over which an express business may be done.

The decision of the Supreme Court of the State of Mississippi in the case of—

New Orleans M. & C. Railroad Co. vs. State, 110 Miss. 290; 70 So. 355,

is relied upon by that Court in this case to sustain its construction that the privilege tax provided by Section 21 does not violate the Commerce Clause of the Federal Constitution. In the cited case, the Supreme Court of Mississippi while reiterating the holding made in a former case to the effect that the tax levied under Sections one and two of Chapter 102 of the Laws of Mississippi of 1912 (which sections and Chapter were amended by Section 45 of Chapter 104 of the Laws of Mississippi of 1920, the present law) was not an ad valorem tax, but was a privilege tax proper, at the same time states (70 So. 357):

> "While the act itself levies the tax and provides that standard gauge railroads outside of levee districts shall be divided into three classes, it yet remains that the Railroad Commission must classify before the levy is complete.
>
> 'If it be conceded that the act levies a tax, it still remains true that something more was necessary, to wit: the classification referred to. '*Railroad Co. vs. Adams*, 83 Miss. 320, 36 South. 145.'
>
> * * * * *
>
> It may be that the directions given the Commission by Chapter 102, Laws of 1912, for classifying railroads for privilege tax purposes, are very general and, to some extent, indefinite. They are, however, given a general rule to go by, viz: to classify the several railroads according to their charter and the gross earnings of each."

And further, in the opinion in the particular case, (70 So. 358) the Supreme Court of Mississippi says:

> "The direction to the Railroad Commission to consider the gross earnings of the railroads is only a

part of the general directions given. They are also directed to consider the charter of the several railroad companies. We are not called upon in this case to define every element that should properly be considered by the Railroad Commission in determining the particular class to which any road should be assigned, but we do say that the act gives evidence of a general rule whereby the Commission should consider the charter rights and privileges of each company. *It was the purpose of the Legislature to graduate the taxes according to the business and rights enjoyed.* In determining the class the Legislature thought it material for the Commission to look to the general charter of the company and the extent of the rights and franchises therein conferred upon the company. Is the company in any particular case one chartered to operate a grand trunk railroad or a line of a few miles? Is it one equipped for and capable of doing a large business? In other words, a charter and charter privileges give evidence of the volume of business prepared to be done, and actually being done by any railroad in Mississippi, and to some extent define its prosperity. (Italics ours.)

To quote further, on page 359 of the case in the 70th Southern, we find the Court, after discussing the question as to whether the tax is imposed upon gross earnings intrastate as well as interstate, making a dictum which is very illuminating here—as follows:

> "Any interpretation of the statute must take into account the fact that the Legislature in giving these directions is not itself directly imposing a tax upon the earnings of the railroad, but is investing an inferior tribunal or governmental functionary with the general authority to classify all railroads in five classes. *This tribunal stands between the parties with authority to fix the classification and there-*

> *by equitably adjust the rights of all parties. In fixing the classification any railroad has the right to be heard, to offer evidence, reserve objections to any adverse ruling, and to have the proceedings and judgment of this tribunal reviewed by the circuit Court through the proper writ of certiorari."* (Italics ours.)

Further, the Supreme Court of Mississippi in the case of—

> *Gulf & S. I. Railroad Co. vs. Adams, State Revenue Agent, 85 Miss. 772; 38 So. 348,*

has declared that the Railroad Commission in classifying railroads according to charter exemptions and gross earnings acted judicially. The Court, on page 351, 38 Sou., said with regard to the classification of railroads for privilege taxes:

> "It was the duty of the Commission to classify them according to charter exemptions (from state supervision) and gross earnings. The Commission classified them as railroads of the third class, and of the first, second, and third classes, respectively, saying nothing as to charter exemptions. This classification, in each case, was a judicial act. Everything was concluded by it which was comprehended or involved in it. It amounted to an adjudication that these roads were not liable for the years in question to the privilege tax of $10 per mile as railroads claiming exemption from state supervision. This judgment is final and conclusive, and cannot now be brought in question. *Railroad Company vs. Adams*, 77 Miss. 778; 25 South 355; *Railroad Company vs. Adams*, 81 Miss. 105, 32 South. 937."

It is established, therefore, by the decisions of the Supreme Court of Mississippi:

First: That Railroads, when classified, have the right to be heard concerning the facts and elements pertaining to their classification; and

Second: That when the State Railroad Commission does classify railroads for the purpose of levying privilege taxes, the act of that body in doing so in each instance is a judicial act.

As to express companies, we, therefore, have a statute which enacts that privilege taxes shall be graduated and varied according to whether the business is operated over first class railroad trackage, or over second and third class railroad trackage. We further have the decision of the Supreme Court of Mississippi in this case that the first, second and third class railroads referred to in Section 21 of Chapter 104 prescribing the privilege taxes to be paid by express companies are those classified by the Railroad Commission under Section 45 of Chapter 104. In view of this situation, why should not express companies be accorded notice and hearing when a classification of railroads is made under Section 45?

It would seem that express earnings and the value of the privilege growing out of the operation over certain classes of railroad trackage should be considered in classifying railroads for the purpose of levying privilege taxes on express companies. The legislative intent deduced from the fact that $6.00 per mile was to be assessed for the privilege of operating first class railroad trackage and $3.00 per mile for operating over second and third class railroad trackage, clearly, we think, shows that the earnings of express companies and the privileges enjoyed by them were to be reckoned in fixing the classification. This we believe to be the correct view and the meaning of the law.

If however, we are wrong as to this, what answer can there be to the contention that if express companies are to be taxed according to the classification of railroads made under Section 45 in taxing railroads, then express companies are entitled to a hearing when the classification of railroads is made by the Commission? Why should railroads be accorded a hearing when the classification is made, and other taxing subjects, (express companies) which are bound by the classification, be denied a hearing? Defendant in error planted his case upon the proposition that the classification of railroads by the State Commission was final and binding upon express companies, despite the fact that these companies were not given a hearing when the classification was made, and the Supreme Court of the State of Mississippi has upheld such contention of defendant in error.

We concede that privilege or occupation taxes are often represented by a fixed amount, and that in such cases no hearing either can or should be given the taxpayer, but we respectfully submit that where a privilege tax is graduated and levied according to classifications arrived at under the ascertainment of particular facts, no such classification can be valid unless a tax-payer whose taxes are assessed under it is given a hearing; and we further respectfully insist that any law which provides for an assessment and levy of taxes under such a classification which fails to provide for a hearing to the tax-payer is in conflict with the Fourteenth Amendment to the Constitution of the United States.

The decision of this Court in—

Hager vs. Reclamation District No. 108, 111 U. S. 701,

is authority in supporting the general doctrine that license taxes can ordinarily be imposed upon occupation and business

without requiring that a hearing be allowed to the persons subject thereto, and yet, in this very case the exception for which we contend is made by the Court.

In the opinion by Mr. Justice Field on page 709, it is said:

> "Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the tax-payer, nor would notice be of any possible advantage to him, such as pole taxes, license taxes (*not dependent upon the extent of his business*), and generally, specific taxes on things, or persons, or occupations." (Italics ours.)

Here we have a statute in which the amount of the tax is manifestly dependent upon the extent of the business. Dependent upon the extent of what business? We believe that the extent of the express business was what the Legislature must have had in view, or else the tax sought to be levied would be in essence arbitrary and without regard to any reasonable standard or criterion.

But if it is to be measured by the extent of the business done by railroads and according to the charter provisions of railroads, an investigation of facts based upon evidence is required, and the proceeding in which classification is made is necessarily judicial as the Supreme Court of Mississippi has declared it to be; and in such case, notice and hearing to each tax-payer concerned is just as necessary as when a tax is levied upon property and the value of the property must be ascertained, and particularly is this true when a large penalty is exacted upon a failure to pay the tax.

This Court in the case of—

Central of Georgia Railway Co. vs. Wright, 207 U. S., 127,

in the opinion on page 138 says:

> "Former adjudications in this Court have settled the law to be that the assessment of a tax is action judicial in its nature, requiring for the legal exertion of the power such opportunity to appear and be heard as the circumstances of the case require. *Davidson* v. *New Orleans*, 96 U. S. 97; *Weyhauser* v. *Minnesota*, 176 U. S. 550; *Hager* v. *Reclamation District*, 111 U. S. 701.
>
> "In the late case of Security Trust & Safety Vault Company vs. The City of Lexington, 203 U. S. 323, decided at the last term of this Court, the subject underwent consideration, and it was there held that before an assessment of taxes could be made upon omitted property notice to the tax-payer with an opportunity to be heard was essential, and that somewhere during the process of the assessment the tax-payer must have an opportunity to be heard, and that this notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace. In that case it was further held that where the procedure in the state court gave the tax-payer an opportunity to be heard upon the value of his property and extent of the tax in a proceeding to enjoin its collection the requirement of due process of law was satisfied."

It must be borne in mind that although the privilege tax assessed against the plaintiff in error here, as well as the penalty assessed on account of its failure to pay such privilege tax before beginning business is being sued for in the Courts, plaintiff in error was not afforded the opportunity in the action to be heard regarding:

First: The absence of a classification according to its business; and

Second: To be heard as to the correctness of the classification made by the Commission of the railroads over which it operates. Such classification was fixed and settled and could not be reviewed otherwise than by certiorari.

Gulf & S. I. Railroad Co. vs. Adams, State Revenue Agent, supra, 38 So. 348.

New Orleans M. & C. Railroad Co. vs. State, supra, 70 So. 357,

in which latter case, it is held that the judgments of the Commission in classifying railroads for privilege tax purposes "are binding upon both the state authorities and the railroad companies assessed, unless, of course, an appeal is prosecuted in the method prescribed by statute," citing the case of

Railroad Co. vs. Adams, 85 Miss. 772, 38 So. 348, supra.

in which it is distinctly held that the remedy from an erroneous assessment of the Railroad Commission is by certiorari.

Therefore, under the decisions of the Supreme Court of Mississippi, unless an express company participated in a hearing before the Railroad Commission when railroads were classified under Section 45, Chapter 104, and unless it reviewed by certiorari the correctness of the classification, the doors of the Courts would be closed to it insofar as a review of the classification made might be concerned.

See also—

Western Union Telegraph Co. vs. Kennedy, 69 So. 674; 110 Miss. 73.

This leads us to say that the tax herein contested was assessed under a law which makes no provisions for express

companies to be heard upon facts governing classification of railroads, under which classifications the privilege taxes which they are to pay become fixed and binding.

Defendant in error squarely takes the position that it is not essential to due process of law that an opportunity to express companies to be heard be given, and the Supreme Court of Mississippi holds that due process is not denied "by the classification of railroads without notice to express companies intending thereafter to transport or engage in transporting freight over them."

Without regard to what has been done under the law, if the requirement of the Fourteenth Amendment to the Constitution of the United States as to due process of law is not met, the statute is unconstitutional, and the tax, together with the penalty sued for, is consequently invalid.

"Constitutional validity of the law is to be tested not by what has been done under it, but by what may by its authority be done."

> *Violett's Heirs, et. al. vs. City Council of Alexandria (Supreme Court of Appeals of Virginia) 23 S. E. 913;*
>
> *Stuart v. Palmer, 74 N. Y. 188;*
>
> *Cole vs. Armour Fertilizer Works, 237 U. S. 413, 424, 425;*
>
> *Security Trust Co. vs. Lexington, supra;*
>
> *Roller vs. Holly, 176 U. S. 398, 409;*
>
> *L. & N. Railroad Co. vs. Stock Yards Co. 212 U. S. 132, 144.*

Particularly and especially is it necessary that a taxpayer shall be accorded a hearing in cases where facts must be considered and found in order to assess a tax where the

failure to pay the tax assessed is accompanied by a severe penalty.

Manifestly here, the penalty sued for represents a punishment, and notice and hearing before such penalty is inflicted would seem to be absolutely necessary in order that due process of law be accorded.

Regal Drug Corporation vs. Waddell, Collector, 43 Supreme Court, 152;

O'Sullivan vs. Felix, 233 U. S. 318;

Central of Ga. Ry. Co. vs. Wright, supra;

Lipke vs. Lederer, Collector, 259 U. S. 557, 42 Supreme Court, 549.

IN THE EXACTION OF THE PRIVILEGE TAX AND PENALTY PLAINTIFF IN ERROR IS DENIED THE EQUAL PROTECTION OF THE LAWS.

Under this branch of the case, we contend that the Fourteenth Amendment is violated in two particulars:

First: Because railroads under Section 45 of Chapter 104 of the Laws of Mississippi are accorded the right to be heard upon the classification fixed by the Railroad Commission for the purpose of exacting privilege taxes of them, and this right is not accorded to express companies.

Second: Because under Section 73, Chapter 104 of the Laws of Mississippi of 1920 (quoted in the statement of the case) a penalty of double the amount of the privilege tax is sought to be exacted of the corporations and persons subject thereto who fail to pay such privilege tax before beginning business, while similar corporations and persons who have already begun business are allowed thirty days after the

accrual of the tax within which to pay the same, and are accordingly exempt from the penalization for a period of thirty days longer than are those who fail to pay the tax before beginning business.

In the case of—

> *New Orleans M. & C. Railroad Co. vs. State, 70 So. 355.*

the dictum made by the Supreme Court of Mississippi, on page 359 already quoted and here repeated as follows:

> "In fixing the classification, any railroad has the right to be heard, to offer evidence, reserve objections to any adverse ruling, and to have the proceedings and judgment of this tribunal reviewed by the circuit court through the proper writ of certiorari,"

is a clear recognition of the right of railroads to be heard when classified by the Railroad Commission for the purpose of levying privilege taxes against railroads. In other words, the Supreme Court of Mississippi considers that due process of law requires that hearing shall be accorded to railroads when classification of them is made. Upon the other hand, the Supreme Court of Mississippi in this case has held that so far as express companies are concerned, notice and hearing to them is not required in order that due process of law be accorded. It is settled that this Court is the final arbiter upon questions raised under the Constitution of the United States, and insofar as these questions are concerned, the decision of the State Supreme Court is not conclusive.

> *Crew Levick Co. vs. Pennsylvania 245 U. S. 292, 294.*

This leads us to the contention that not only is the plaintiff in error denied due process of law in not being accorded

a hearing when railroads are classified, but is also denied the equal protection of the law.

Let it be borne in mind that the classification of railroads provided for in Section 45 of Chapter 104, according to the decision of the Supreme Court of Mississippi in this case, is to be used not solely for the purpose of levying privilege taxes upon railroads, but also for levying privilege taxes upon express companies. We have argued that accepting the construction of the Supreme Court of Mississippi, there is uncertainty in the law, but we go further on this branch of the case and say that under this construction, one tax-payer whose privilege taxes are governed by the classification under Section 45, is allowed a hearing when the classification is made as a matter of right, and another is denied a hearing on such classification. No reason for this discrimination can be conceived. When Section 45 of Chapter 104 is engrafted upon Section 21 of the same Chapter, if the law in such situation can be construed as meaning that the classification of railroads by the Railroad Commission is for the purpose of taxing express companies, then the system arbitrarily discriminates as between express companies and railroads. Defendant in error contends that the classification of railroads by the Railroad Commission under Section 45 is final and binding upon express companies although they are not allowed to be heard when the classification is made, and the Supreme Court of Mississippi has upheld such contention. This view of the law utterly disregards the graduated nature of the privilege tax prescribed by Section 21. It disregards the fact that under the plain terms of Section 21, the tax imposed upon express companies is double the amount where operations are over first class railroad tracks of that prescribed where operations are over second and third class

railroad tracks. When this difference in the amount of the levy is made, it depends upon the character of the trackage; that is to say, as to whether or not the same is first class, upon the one hand, or second and third class upon the other, according to the classification of the Railroad Commission. It inevitably follows that express companies are entitled to be heard when the classification of railroad trackage is made. Its interest in the classification is relatively the same as that railroads have; and to accord the latter the right to be heard and to deny it to express companies, is to create a discrimination based upon no sound reason and which is necessarily arbitrary and unsustainable.

The record in this case shows that plaintiff in error tendered to the State Revenue Agent the privilege taxes assessed against it within thirty days after it began business. A severe penalty was assessed against it on account of its failure to pay such privilege tax before it began business, and judgment for this penalty has been rendered by the Supreme Court of Mississippi. Why should persons engaged in businesses and occupations in Mississippi subjecting them to the payment of privilege taxes be allowed thirty days after the privilege tax becomes due within which to pay it where they are already in business and other persons not already in business be penalized for failure to pay the same before beginning business? The privilege tax in every instance must be supposed to represent a fair amount to be paid to the State for doing business in Mississippi. If this be true, and it must be admitted that it is, then a concern already in business has done no favor to the State by paying a privilege tax for any given year, but such concern has merely paid what was just and due to the State, and is, therefore, entitled to no special consideration at the hands of the State.

No reason for the distinction made between those already in business and those beginning business exists, and such distinction represents nothing less than an arbitrary discrimination between tax-payers of the same class.

We admit that there exists "no iron-bound rule of equality" in taxation under the Fourteenth Amendment, but we do insist that distinctions made in taxation through classification must, in order to be permissible, be based upon some real ground. This Court in the case of—

> *Southern Railway Company vs. Greene, 216 U. S. 400, 417,*

has in an illuminating way stated the limitation upon states in making classification for the purpose of taxation. In the opinion on page 417, it is said:

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; ***and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification.*** (Italics ours.)

The Court in the present case holds: (94 Sou. 212)

> "That the discrimination complained of between persons beginning a new and those conducting an old business is not unreasonable, and, therefore, does not violate the Fourteenth Amendment to the Federal Constitution."

The Court states no ground for its decision that the discrimination in question is not unreasonable. Of course, whether there is a violation of the Federal Constitution is a

question for final decision by this Court. We can call to mind no possible ground upon which the reasonableness of this discrimination can be based unless it is upon the idea that the States owe more consideration to a corporation which has paid the tax for a past year, and makes itself subject to the same tax for a subsequent year than to a person who has just put itself in position to become a tax-payer. But, as stated above the fallacy in this idea is that it presupposes that the payment of taxes to the State amounts to a favor conferred by a tax-payer, when it must be conclusively presumed that such payment represents nothing more than a just obligation on the part of the tax-payer to the sovereign for protection and privileges enjoyed, and that in paying the tax for the past, the tax-payer has done nothing more than to perform his governmental obligation. If a former tax-payer is entitled to more consideration than a new tax-payer, why would not the State upon the same theory be justified in making a future tax upon a former tax-payer less than that imposed upon the beginner in business?

Hayes vs. Missouri, 120 U. S. 68.

What we insist upon here is nothing more than the right which this Court has held that all persons are guaranteed under the Fourteenth Amendment, that is, that all "shall be treated alike under like circumstances, both in the privilege conferred and in the limitations imposed." But where distinctions have been made in the respects which we have endeavored to point out in this branch of the argument, it would appear that plaintiff in error has been subjected "to an arbitrary exercise of the powers of government." In two glaring particulars it has not been accorded the privileges granted by the State of Mississippi to others, as we contend, under like circumstances and conditions. That dis-

crimination has been made is unquestionable, and that such discrimination was without legal justification and was based upon no reasonable ground we believe to be also unquestionable.

In passing upon the Federal questions which we have endeavored to present, the facts of this case are, of course, to be determinative. As just adverted to, the Supreme Court of Mississippi has neither given reasons nor stated facts upon which it bases its decision that the discriminations complained of by plaintiff in error are not objectionable to the guarantees of the Fourteenth Amendment. Can any sound reasons be advanced, or any facts asserted which will justify the discrimination made in favor of those conducting an old business as against those beginning a new business? This Court will look to facts and reasons, their existence or absence, though the Mississippi Supreme Court has omitted to state any in making its decision.

Carson vs. Curtiss, 234 U. S. 103, 106;

Merchants National Bank of Richmond vs. Richmond, 256 U. S. 635, 638.

What this plaintiff in error claims is the application of the principle forcibly announced by this Court in the case of-

Atchison, Topeka & Santa Fe Railway Co. vs. Vosburg, 238 U. S. 56.

In the opinion on page 59, the Court, after stating that the legislation under consideration was properly to be regarded as a police regulation, pronounces this dictum:

> "The constitutional guaranty entitles all persons and corporations within the jurisdiction of the State to the protection of equal laws, in this as in other departments of legislation. It does not prevent

classification, but does require that classification shall be reasonable, not arbitrary, *and that it shall rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation.*" (Italics ours.)

See also—

Gulf, Colorado & Santa Fe Railway Co. vs. Ellis, 165 U. S. 150, 155, 165;

Cotting vs. Kansas City Stock Yards Co. and The State of Kansas, 183 U. S. 79;

Connolly vs. Union Sewer Pipe Co. 184 U. S. 540.

Respectfully submitted,

SANDERS McDANIEL.

A. S. BOZEMAN.

H. L. GREENE.

Attorneys for Southeastern Express Company, Plaintiff in Error.

In The Supreme Court of The United States.

SOUTHEASTERN EXPRESS COMPANY,
Plaintiff in Error

vs.

STOKES V. ROBERTSON, STATE REVENUE AGENT,
Defendant in Error

Number 201

October Term, 1922.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

BRIEF FOR STOKES V. ROBERTSON, STATE REVENUE AGENT, DEFENDANT IN ERROR.

R. A. COLLINS,
C. C. DUNN,
A. B. AMIS,

Attorneys for Stokes V. Robertson,
State Revenue Agent,
Defendant in Error.

[illegible] PRINTING CO., MERIDIAN, MISS.

LIST OF CASES CITED

In The Supreme Court of The United States.

SOUTHEASTERN EXPRESS COMPANY,
Plaintiff in Error

vs.

STOKES V. ROBERTSON, STATE REVENUE AGENT,
Defendant in Error

October Term, 1922.

Number 802.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

BRIEF FOR STOKES V. ROBERTSON, STATE REVENUE AGENT, DEFENDANT IN ERROR.

ARE THE STATUTES OF MISSISSIPPI IMPOSING A GRADUATED PRIVILEGE TAX ON EXPRESS COMPANIES, BASED UPON THE CLASSIFICATION OF RAILROAD TRACKS OVER WHICH THE BUSINESS IS TO BE CONDUCTED VOID FOR UNCERTAINTY AND OR FOR FAILURE TO ACCORD SUCH COMPANIES THE RIGHT TO BE HEARD RESPECTING SUCH CLASSIFICATION?

The decision of the Supreme Court of Mississippi in deciding this case, under the rule of decision by this court, disposes of the contention of the Plaintiff in Er-

ror that the statutes of the State of Mississippi are so vague, uncertain and indefinite as to be void. If there might have been any uncertainty as to the statutes in question they have been rendered certain by the decision of the State Supreme Court in construing them. The question, therefore, is whether the statutes, as construed, when applied to the Plaintiff in Error deprives it of some right guaranteed to it by the Constitution of the United States.

It is apparent that the tax in question is an excise or privilege tax imposed by the State of Mississippi upon express companies for the privilege of engaging in the business of such companies within the State.

New Orleans, M. & C. Railroad Company vs. State, 110 Miss., 290.

Robertson, State Revenue Agent, vs. Southwestern Express Company, 94 Southern Reporter, 210.

The validity of statutes requiring the payment of such taxes by corporations and individuals engaged in intrastate, and interstate business, within the state, has been definitely settled by this court.

Osborne vs. State of Florida, 164 U. S. 650.

Pullman Company vs. Wirt Adams, State Revenue Agent, 189 U. S. 419.

The Plaintiff in Error contends that under the con-

struction placed upon the statute by the Supreme Court of Mississippi, it is lacking in certainty inasmuch as it does not provide for a classification of railroads for the purpose of taxing express companies. It should be observed in this connection that the statute which requires the payment of the privilege tax by express companies, as construed by the Supreme Court of the State, makes no pretense of classifying railroads for the purpose of imposing the tax. The statute takes cognizance of the fact that railroads within the State are classified already. It is wholly immaterial as to what the purpose in the classification was.

It is correctly contended that the business of a common carrier by express is separate and distinct from a common carrier by railroad. Since this is true, there exists ample reason and justification as a matter of constitutional law for a separate and distinct method of imposing an excise tax upon the business of a carrier by express and a carrier by railroad. No principle of law, constitutional or otherwise, is violated by a state requiring a common carrier by express to pay an excise tax for the privilege of doing business within the State when at the same time no such tax is required of a common carrier by railroad.

It was contended by the Plaintiff in Error in the State Supreme Court that since the classification of railroads had not been made in reference to the business of express companies, the law could not be applied or enforced against such companies for uncertainty.

Now, that said court has construed the laws so as to make the classification of railroads applicable and pertinent in enforcing the payment of the tax it is contended that the act is void because it does not afford an express company the right to be heard respecting the classification of railroads as a means of determining the mileage tax to be paid by the company. There would be much merit in this contention as a practical business proposition, and also as a matter of law, if the taxes were graduated upon the amount of the business done in pursuance of the business, or if the tax was based upon property values, such as the value of the railroad itself; but that is not the case here at all. The tax is purely an excise or occupation tax imposed on the privilege of engaging in the business at certain places and under certain conditions.

In the first place, for the business of transporting freight or passengers by express from one point to another in the State, a tax of $500.00 is required, and secondly, in addition thereto a tax of a graduated amount for each mile of railroad tracks over which it operates the business is required, without any regard whatever as to the quantity of freight it shall transport, the number of passengers carried, or the amount received by it in gross for the services rendered. The tax in its essence is an excise tax. This seems to be conceded in the argument for the express company. But it is contended by the Plaintiff in Error that the legislature recognized that there should be a difference in the amount which ought to be paid for the privilege of operating its busi-

ness over first and second class railroad tracks, and therefore there is recognition of such classification of railroad tracks in respect to the express business, and in consequence thereof it became necessary, as a matter of constitutional law, for the act to provide a means of determining what are first, second and third class railroad tracks in reference to the operation of an express business, and that having failed to do so, to require the payment of the tax by an express company without giving to it an opportunity to be heard, deprives it of its property without due process of law. This contention assumes the existence of an intent on the part of the legislature which is not justified by the provisions of the law. Is it not more reasonable to say that the legislature had knowledge of the fact that railroad tracks in Mississippi had been classified and used the established classification as a basis of imposing the tax, just as is done in many other instances, such as making the population of a municiplaity, etc., the basis for fixing the amount to be paid for exercising a privilege, than it is to assume that the legislature intended that the classification should have been made in reference to the amount of business to be done by an express company?

When passing the act imposing the tax in question, the legislature knew that railroads within the State had been classified and would thereafter be classified by means of legal machinery then existing, (not for the purpose of laying a tax on express companies to be sure). It adopted the fixed status of the various rail-

road tracks within the State as the criteria for fixing the amount which should be paid by express companies as a privilege tax for operating their business over such lines or tracks within the State. The adoption of the existing classification of railroad tracks left nothing to be determined and nothing in doubt. No fact of a judicial nature is to be ascertained and adjudged as a condition precedent to the payment of the tax required. No question between the tax payer and the State to be settled, and therefore no necessity for notice and a hearing exists. The Supreme Court of the State has so construed the act in question in deciding this case, and its decision is conclusive, unless the effect thereof is such as to deprive the Plaintiff in Error of some right guaranteed to it by the Constitution of the United States.

This court in the case of Osborne vs. State of Florida, 164 U. S. 650, says: "The second ground for holding the statute void is that it is not sufficiently determinate, definite, and certain in its character upon which to ascertain the amount to be paid for licenses. This ground furnishes no reason for interference by this court. Whether the statute be sufficiently determinate or certain in its character upon which to ascertain the amount to be paid for a license is a question of the construction of the State statute which does not necessarily involve a Federal question, and the determination of the State court as to the proper construction and sufficiency of such a statute is conclusive upon us. The learned counsel for Plaintiff in Error is mistaken

in assuming this court has any more power than formerly to review, upon a writ of error from a State court, the determination of that court in regard to the particular construction to be given to the statutes of its own State.

The Supreme Court of the United States in Hager vs. Reclamation Dist. No. 108, 111, U. S. 701, says:

> "Of the different kind of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the tax payer, nor would notice be of any possible advantage to him, such as poll taxes (not dependent upon the extent of his business) and generally, specific taxes on things or persons or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the tax payer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles, a fixed sum per yard, or bushel, or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do a business of a particular kind or at a particular place, such as keeping a hotel or restaurant, or selling liquors or cigars or clothes, he has only to pay the amount required by the law and go into the business.

> There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the State, or on domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it."

Again, the Supreme Court of the United States in State Tax on Foreign-held Bonds, 15 Wall. 319, in passing on the power of the State to make selection of property to be taxed and the modes of taxation, said:

> "It may touch business in almost infinite forms in which it is conducted, the professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State, as to the mode, form and extent of taxation, is unlimited, where the subjects to which it applies are within her jurisdiction."

Here the State is exercising the unquestionable power to impose an excise tax on the business of an express company within its jurisdiction. In order to do this it says to the express company, you must pay $500.00 flat, and in addition thereto, you will be required to pay six dollars per mile for each mile of first class railroad tracks and three dollars per mile for each mile of second and third class railroad tracks over which you operate your business. The railroad tracks have been classified. There is no uncertainty in the laws of the

State as to which class the various railroad tracks belong. The person or corporation who desires to engage in an express business knows the railroads over which it is proposed to operate the business, and is advised by the laws of the State exactly to what class the railroad track belongs. The law unquestionably prescribes a simple mode for the ascertainment of the amount to be paid for the privilege, and the corporation has nothing to do save pay the tax and operate its business or let it alone as it may choose. Plaintiff in Error has no more cause to complain that it has been denied the right to be heard on the question as to what are first, second and third class railroad tracks within the State, than any other tax payer would to insist that he should have the right to be heard on the question of the population of towns and cities, when he comes to pay a tax which is graduated in amount upon the population of the particular town or city in which he proposes to engage in the business taxed.

We respectfully submit that no constitutional right of the Plaintiff in Error has been violated by the State of Mississippi in requiring it to pay the tax in question, without a hearing first had as to what are first, second and third class railroad tracks within the State; even though the amount of the tax it is to pay is determined by the character and the number of miles of railroad trackage over which it is to operate its business as an express company.

SHOULD THE PLAINTIFF IN ERROR BE REQUIRED TO PAY THE PENALTY FOR ITS FAILURE TO PAY THE TAX BEFORE BEGINNING BUSINESS?

Assuming that the tax itself was legal there could be no question as to the power of the legislature to impose a penalty for failure to pay the tax provided the penalty is made to operate uniformly upon all delinquents similarly situated.

The act of the legislature (Section 73, Chapter 104 of the Laws of Mississippi, 1920) provides as follows:

> "Damages in case of failure to procure license: All persons, firms, partnerships or corporations liable for privilege taxes, who shall fail to procure the license therefor before beginning the business taxed, or who shall fail to renew, during the month in which it is due, the license on a business on which he has theretofore paid a privilege tax, shall, in each or either such instances, be liable for double the amount of the tax, and it is hereby made the duty of the Tax Collector of the county in which such business is conducted, to collect the amount, issue a separate license therefor, and to endorse across its face the words, 'Collected As Damages.'"

The Supreme Court of Mississippi in responding to the contention of the Plaintiff in Error that the act discriminated between persons beginning a new business and those theretofore engaged in the same kind of business, said, "That the discrimination complained

of between persons beginning a new, and those conducting an old business is not unreasonable, and, therefore, does not violate the Fourteenth Amendment to the Federal Constitution."

The power of the Legislature to make classifications of persons for the purpose of the imposition of penalties, etc., is undoubted. The test in such case is the reasonableness of the distinction, and not as to the existence of the power to make the distinction, and classification, at all. If there is a reasonable ground for the distinction, the classification will be sustained. Peculiar circumstances which surround particular persons or corporations are ample grounds for holding laws which discriminate for or against them, valid. 8 C. Y. C. 1052 (cases cited in note 51). St. John vs. People of New York, 201 U. S. 633. Whenever the law operates alike upon all persons and property similarly situated, equal protection of the law cannot be said to be denied. Walston vs. Nevin 128 U. S. 578. State vs. Schimer 10 L. R. A. 135. State vs. Moore 104 N. C. 714 Exparte Swann 96 M 44. Benier vs. Connally 113 U. S. 32. Soon King vs. Crowlsy, 113 U. S. 809.

The situation of the persons in the cases mentioned in the statute are different. One has immediately therefore been engaged in the business and has paid the tax for the privilege for the previous year and in consideration thereof the State may grant or give one month's grace for the renewal of the license. The other has not been engaged in the business at all, and has

not theretofore paid any taxes to the State. We submit that the difference in the situation of the persons is amply sufficient to authorize the distinction in law.

The question here is one of local policy, and this court will not disturb the decision of a State court in such matter unless it affirmatively appears from the judgment of the State court that to uphold the same would result in real oppression or manifest wrong.

People of the State of New York vs. Walter W. Law, decided April 30th, 1923, by this court.

Respectfully submitted,

R. A. COLLINS,
Attorney for Stokes V. Robertson,
State Revenue Agent,
Defendant in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 201.

SOUTHEASTERN EXPRESS COMPANY, *Plaintiff in Error,*
vs.
STOKES V. ROBERTSON, STATE REVENUE AGENT,
Defendant in Error.

JOINT MOTION ON THE PART OF PLAINTIFF IN ERROR AND DEFENDANT IN ERROR TO SUBSTITUTE W. J. MILLER, STATE REVENUE AGENT, AS DEFENDANT IN ERROR IN LIEU OF STOKES V. ROBERTSON.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 201.

SOUTHEASTERN EXPRESS COMPANY, *Plaintiff in Error,*
vs.
STOKES V. ROBERTSON, STATE REVENUE AGENT,
Defendant in Error.

Come the Southeastern Express Company, Plaintiff in Error, and Stokes V. Robertson, State Revenue Agent, Defendant in Error, by their respective attorneys, and suggest to the Court that pending the writ of Error in this Court, on to wit: the 22nd day of January, A. D. 1924, the term of office of said Stokes V. Robertson, as State Revenue Agent of the State of Mississippi expired, and thereupon, the said Stokes V. Robertson ceased to be the State Revenue Agent of the State of Mississippi.

On said 22d day of January, A. D. 1924, W. J. Miller became and is now the State Revenue Agent of the State of Mississippi, being the successor in office to said Stokes V. Robertson.

It is provided by Section 510 of Hemmingway's Annotated Code of Mississippi now in full force and effect as follows:

"510. (727) Certain actions not to abate.—Actions by or against public officers in their official character, or by or against trustees or commissioners in reference to the trust committed to them, or by or against persons who occupy a similar position to that of public officers, trustees or commissioners, shall not abate on account of the change of the person occupying such position, but may be revived and proceeded with in the name of the successor of such person."

Wherefore the plaintiff in error and the defendant in error jointly move the Court that this cause may be revived in this court and proceeded with in the name of said W. J. Miller, State Revenue Agent, as Defendant in error, he being the successor of the said Stokes V. Robertson, State Revenue Agent.

And the said W. J. Miller, State Revenue Agent of the State of Mississippi, by his attorneys, enters his appearance in this proceeding and joins also in the foregoing motion.

SOUTHEASTERN EXPRESS COMPANY,
By SANDERS MCDANIEL,
H. L. GREENE,
A. S. BOZEMAN,
Attorneys for Southeastern Express Co., Plaintiff in Error.

R. A. COLLINS,
C. C. DUNN,
A. B. NORRIS,
Attorneys for Stokes V. Robertson, State Revenue Agent, Defendant in Error.

R. A. COLLINS,
C. C. DUNN,
A. B. NORRIS,
Attorneys for W. J. Miller, State Revenue Agent, Defendant in Error.

Counsel for Parties.

SOUTHEASTERN EXPRESS COMPANY *v.* ROBERTSON, STATE REVENUE AGENT.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 201. Argued March 5, 1924.—Decided April 21, 1924.

1. An objection that a state taxing statute violated due process of law because of its vagueness, *held* to have been obviated by elucidation of the statute by the state court in this case. P. 539.
2. A state constitutionally may condition the right of an express company to enter upon and transact intrastate business, by requiring antecedent payment of a tax based on the number of miles of railroad tracks in the State over which the business is to be operated, and varied according to a classification of the tracks made for the purposes of railroad taxation and as to which neither notice nor opportunity to be heard is vouchsafed the express company. P. 539.
3. Because of the differences between express and railroad companies, the former are not denied the equal protection of the laws by refusing to them, while allowing to the latter, the right to be heard concerning a classification of railroad tracks upon which the calculation of the privilege taxes of each in part depends. P. 540.
4. Nor is the Equal Protection Clause violated by a penalty provision applicable to a newcomer who does not pay his license tax before beginning the express business, but inapplicable to those already in the business, who pay and renew within thirty days after their taxes accrue each year. P. 540.

130 Miss. 305, affirmed.

ERROR to a judgment of the Supreme Court of Mississippi holding the Express Company liable for a license tax, and for a like amount as damages for not having paid the license tax before beginning business in the State, as required by §§ 21, 73, c. 104, Miss. Laws 1920. See also the next following case. Mr. Miller, successor in office to Mr. Robertson, was substituted in this Court.

Mr. Sanders McDaniel, with whom *Mr. A. S. Bozeman* and *Mr. H. L. Greene* were on the brief, for plaintiff in error.

Mr. R. A. Collins, for defendant in error, submitted. *Mr. C. C. Dunn* and *Mr. A. B. Amis* were also on the brief.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Error to review the judgment of the Supreme Court of Mississippi holding the Express Company liable for a privilege tax for doing business without first having paid the tax imposed by the laws of the State, and for damages. § 21, c. 104, Laws of 1920, Hemingway's Code Supplement 1921, § 6512, and § 73, c. 104, Laws of 1920, Hemingway's Code Supplement 1921, § 6630.

There is an agreed statement of facts. The Express Company is a common carrier of freight of various kinds over certain lines of railroads in the State in both interstate and intrastate commerce. It commenced business May 1, 1921.

Section 21, c. 104, provides as follows: "Express companies—On each express company transporting freight or passengers from one point to another in this State $500.00. And six dollars per mile on all first class railroad tracks in this State over which the business is operated, and three dollars per mile on all second or third class railroad tracks in this State over which the business is operated."

By § 73, c. 104, it is provided that all persons or corporations liable for privilege taxes "who shall fail to procure the license therefor before beginning the business taxed, or who shall fail to renew, during the month in which it is due, the license on a business on which he has theretofore paid a privilege tax, shall in each or either such instance be liable for double the amount of the tax, and it is hereby made the duty of the tax collector of the county in which such business is conducted to collect the amount, issue a separate license therefor, and to endorse across its face, the words: 'Collected as damages.'"

The Express Company did not pay any privilege tax before commencing business May 1, 1921, nor obtain the license which issues on such payment.

Robertson, predecessor of the present defendant in error, acting in his capacity of State Revenue Agent, made an assessment against the company for the sum of $4,325.33 as the tax under § 21, c. 104, and a like sum as damages under § 73.

The Company tendered the amount assessed as the tax but declined to pay the amount assessed as damages. The tender was refused and this action was brought, resulting in the judgment we have indicated.

There is agreement as to the railroads over which the Express Company carries express and the number of miles the express is carried. And it is agreed that it carries express over all of the railroad tracks, but intrastate express only from station to station in the State.

It is also agreed that under the laws of Mississippi, the Railroad Commission of the State on the first Monday of August, 1920, classified the railroads of the State according to their charters and the gross earnings of each for the purpose of levying a privilege tax on the railroads, the classification being set out, for the year beginning the first Monday of August, 1920. The number of miles of track of each is given. No other or further classification of the railroads was made until August 1, 1921, when they were again classified.

It is also agreed that no classification of the railroad tracks under the laws of the State of 1920, under § 21, c. 104, or otherwise, has ever been made by the Railroad Commission, with reference to the operation of the Express Company or of any other express company over the tracks. And it is agreed that the sum of $4,325.33 imposed, and for which the action was brought, was for the year beginning May 1, 1921, and ending May 1, 1922.

The business done by the Company for the six months beginning July 1, 1921, and ending December 1, 1921, is given.

The court directed a verdict in the sum of $4,383.50, refusing to direct for the penalty. For that amount only was judgment entered.

Robertson and the Express Company each prosecuted an appeal—Robertson to reverse so much of the judgment as denied his right to recover damages or penalty, that is, which limited his recovery to the taxes only; the Express Company to reverse so much of the judgment as was against it. Robertson succeeded in his appeal: the Express Company failed.

The contention of the Company is that the statute denies to the Express Company due process, in that: (a) it is so vague, uncertain and indefinite as to be void; (b) it provides no measure or standard by which to distinguish the railroads in connection with an express business, "and no provision of law is elsewhere found by which it can be ascertained as to what are first class railroad tracks and second and third class railroad tracks in connection with an express business;" (c) although the Supreme Court of Mississippi has held that first, second and third class railroads referred to in § 21 are those required by § 45 to be classified by the Railroad Commission, and although the effect of said holding may be to engraft upon § 21, § 45, even assuming that the connection between the section and their purposes be thus conclusively established by the decision of the Supreme Court of Mississippi, "there still is found neither measure nor standard for classifying railroad trackage for the purpose of taxing the express business operated over such trackage, inasmuch as the classification of railroads under § 45, c. 104, etc., is for the sole purpose '*of levying a privilege tax on railroads;*'" (d) if the classification of railroads despite its purpose can be so extended, there is

no provision for notice and hearing to express companies when the classification of railroads is made.

There is the further contention that plaintiff in error is denied the equal protection of the laws in that: (a) damages in an amount equal to the privilege tax are allowed against it because it failed to pay the privilege tax before entering business on May 1, 1921, while other express companies as well as all other persons and corporations subject to privilege taxes already in business are allowed thirty days after the privilege tax accrues annually within which to pay the same, and "that the discrimination under the law in this respect is arbitrary and unwarranted by any sound reason or principle of distinction;" (b) railroads are accorded the right to be heard upon the correctness of the classification made by the commission which governs the classification under the law for the purpose of levying privilege taxes upon them, while express companies are not accorded a hearing when the classification is made upon them, and are not allowed to present facts either as to the value of particular trackage relative to an express business, or that which under the law governs the classification for the purpose of levying privilege taxes upon railroads.

The Supreme Court of the State held adversely to all of these contentions and we think in correct estimate of them.

If it can be conceded to the Express Company that the statute had vagueness, it was competent for the court to resolve it to clearness, which it did by an explanation of the laws and the relation of their provisions, and deduced therefrom their constitutionality and freedom from the objections urged against them. We are not disposed to an enumeration of the objections. They are somewhat involved. A prominent one is, and it is variously expressed, that the Express Company was not heard in the classification of railroads, it being insisted that between the latter fact and the express business there is intimate

relation and therefore the same right of hearing to the Express Company as to railroads. But the fact of the classification of railroads was one that preceded the Express Company, of which it was aware, and was an element in the estimate of the privilege that was to be granted, for only over the railroads the privilege could be exercised. There was no element of judicial inquiry. The tax was the condition of a privilege to carry on a business—might, indeed, be denominated a license, but call it privilege or license, it was a condition the State could impose, and having the option to impose it, could fix its amount directly or by reference to a standard. *Hagar* v. *Reclamation District*, 111 U. S. 701; *Ohio Tax Cases*, 232 U. S. 576.

The objection that the Express Company was not given a hearing upon the classification of railroads is made a basis for the contention that the Express Company is denied the equal protection of the laws. In specification of this it is said that railroads are entitled to be heard upon their classification, and, therefore, upon the condition upon which the amount of the privilege tax upon them depends, while a hearing is denied to express companies when necessarily the classification is as intimate to and a condition of the tax upon them as upon the railroads. The Supreme Court of the State found reasons for the difference, and there is certainly a difference between railroads and express companies of themselves and necessarily in their relations to their respective businesses, and, against the action of the State and the judgment of its courts, the difference cannot be regarded as not of legal consideration in the imposition of an excise upon the express companies.

It is further urged that there is a discrimination offensive to the Fourteenth Amendment in the laws of Mississippi permitting damages against the Express Company in an amount equal to the privilege tax because it failed to pay the tax before entering, May 1, 1921, while

other companies, persons and corporations already in business are allowed thirty days after the taxes accrue annually within which to pay them. The Supreme Court of the State decided against the contention, and we think that there is difference enough in the situations to justify the difference in the provision and exempt it from the charge of unconstitutionality.

The court thereupon reversed the judgment of the court below and rendered judgment in favor of Robertson for both the tax and damages sued for and, under the practice of the court, entered judgment to that effect with interest and costs.

Judgment affirmed.